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In The

Supreme Court of the United States

THEODORE B. and HELEN C. GOULD,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

HOLYWELL CORPORATION and Subsidiaries,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does a court-approved agreement entered into by the fiduciary of a trust preclude the trust's beneficiary, who was not a party to the agreement, from seeking, through the application of his own net operating loss carryovers, a refund of estimated taxes attributable to trust income received by the fiduciary on the beneficiary's behalf where (a) the agreement did not compromise the amount of taxes payable, (b) the fiduciary was not a bankruptcy trustee and the trust was not a bankruptcy estate, *see Holywell Corporation, et al. v. Smith*, 503 U.S. 47, 55 (1992), and (c) the taxes were retained by the United States as part of a purported compromise of the fiduciary's liability, as an assignee, for post-confirmation income taxes allegedly due from a separate corporation?

Does a court-approved settlement entered into by the assignee of "substantially all" of a corporation's assets, *see Holywell Corporation, et al. v. Smith*, 503 U.S. 47, 53 (1992), and purporting to compromise the corporation's post-confirmation federal income tax liability, preclude the corporation from challenging the legality of the assessment under which the taxes were paid in a suit for refund where (a) the settlement was approved pursuant to a request for a declaratory judgment as to the amount of taxes payable by the assignee in his capacity as fiduciary of a separate trust which was not a bankruptcy estate, (b) the corporation was neither a contracting party to nor represented in the hearing approving the settlement, and (c) the plan under which the assignee received the assets neither provided for nor authorized the payment of taxes on behalf of the corporation?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS OF OTHER COURTS 1

JURISDICTION 1

STATUTES AND REGULATIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE WRIT 11

The Cause of Action in the Goulds' Refund Suit ... 13

The Cause of Action in Holywell's Refund Suit 14

The Settlement Cannot Bind the Petitioners 15

The Bankruptcy Court Lacked Jurisdiction 20

The Anti-Injunction Act Prohibited Holywell from Challenging the Assessment 25

IRC Section 6511 Eliminates Any *Res Judicata* Effect for the Goulds 27

In a Declaratory Judgment Action, *Res Judicata* is Limited to the Relief Requested 29

CONCLUSION 30

APPENDICES

Opinions of the Court of Appeals.....App. 1

Opinions and Orders of the District Court ...App. 15

Orders Denying Rehearings.....App. 27

Text of Pertinent Statutes and Regulations ...App. 31

TABLE OF CONTENTS – Continued

Page

Legislative History of IRC Section 6511 .....App. 53

Bankruptcy Court Order Approving Settlement.....App. 54

Joint Motion with Settlement Terms.....App. 58

United States' Motion to Dismiss Smith's Amended Complaint.....App. 68

IRS Bulletin 391 .....App. 78

IRS Bulletin 396 .....App. 82

TABLE OF AUTHORITIES

Page

CASES:

Allis-Chalmers Corporation v. Goldberg (In re Hartman Material Handling Systems, Inc.), 141 B.R. 802 (Bkrtcy. S.D. N.Y. 1992) 22, 24

Bob Jones University v. Connally, 472 F.2d 903 (4th Cir. 1973) 26

Bob Jones University v. Simon, 416 U.S. 725 (1974) 26

Bull v. United States, 295 U.S. 247 (1935) 25

Burrell v. Commissioner, 400 F.2d 682 (10th Cir. 1968) 16, 18

Commissioner v. Sunnen, 333 U.S. 591 (1947) 12

Enochs v. Williams Packing & Navigation, Inc., 320 U.S. 1 (1962) 25, 26

Flora v. United States, 362 U.S. 145 (1960) 13

General Utilities and Operating Co. v. Helvering, 296 U.S. 200 (1935) 6, 11

Harborside Refrigerated Services, Inc. v. Vogel, 959 F.2d 368 (2nd Cir. 1992) 29

Holywell Corporation et al. v. Smith, 503 U.S. 47 (1992) ..... *passim*

Horn & Hardart & Co. v. National Rail Passenger Corp., 843 F.2d 546 (D.C. Cir. 1988) 29

In re American Bicycle Ass'n, 895 F.2d 1277 (9th Cir. 1990) 24

In re Brandt-Airflex Corp. (Brandt-Airflex Corp. v. Long Island Trust Co., N.A.), 843 F.2d 90 (2nd Cir. 1988) 22

TABLE OF AUTHORITIES – Continued

Page

In re Heritage Village Church and Missionary Fellowship, Inc., (Clark v. United States), 851 F.2d 104 (4th Cir. 1988) 24

In re Holywell Corp., 54 B.R. 41 (Bkrtcy. S.D. Fla. 1985) 2

In re Holywell Corp., 85 B.R. 898 (Bkrtcy. S.D. Fla. 1988) 3

In re Holywell Corp., 177 B.R. 991 (S.D. Fla. 1995) 6

In re Holywell Corp., 911 F.2d 1539 (11th Cir. 1990) 3

Kenny v. Quigg, 820 F.2d 665 (4th Cir. 1987) 29

Lawlor v. National Screen Service Corp., 349 U.S. 322 (1955) 29, 30

Mandarino v. Pollar, 718 F.2d 845 (7th Cir. 1983) 29

Miami Center Limited Partnership v. The Bank of New York, 838 F.2d 1547 (11th Cir. 1988) 3, 10

N.L.R.B. v. United Technologies Corp., 706 F.2d 1254 (2nd Cir. 1983) 14

Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215 (1941) 25

Schrader v. Internal Revenue Service, 1975-1 U.S.T.C. (CCH) 9215 (W.D. Ky. 1975) 28

Smith v. Bank of New York, 161 B.R. 302 (Bkrtcy. S.D. Fla. 1993) 3, 19

Smith v. City of Chicago, 820 F.2d 916 (7th Cir. 1987) 29

Smith v. Holywell Corp., 965 F.2d 994 (11th Cir. 1992) 7

TABLE OF AUTHORITIES – Continued

Page

The Hanson Clutch & Machinery Co. v. United States, 1972-1 U.S.T.C. (CCH) 9303 (N.D. Ohio 1972) 28

The Pittston Company v. United States, 199 F.2d 694 (4th Cir. 1999) 26

United States v. Feinberg, 372 F.2d 352 (3rd Cir. 1967) 16, 18

United States v. Huckabee Auto Co., 783 F.2d 1546 (11th Cir. 1986) 22

United States v. Lane, 303 F.2d 1 (5th Cir. 1962) ... 16, 18

United States v. Mumford, 630 F.2d 1023 (4th Cir. 1980) 14

United States v. Smith, 88-0795 and 88-1053 (S.D. Fla. 1993) 7

United States v. Tatum, 943 F.2d 370 (4th Cir. 1991) 14

United States v. Wilson, 974 F.2d 514 (4th Cir. 1992) 15, 16

STATUTES:

11 U.S.C. § 101 ..... 1, 22, 24

11 U.S.C. § 505 ..... 1, 21, 22, 23, 24

11 U.S.C. § 541 4

11 U.S.C. § 1141 ..... 1, 3

11 U.S.C. § 1146 22

26 U.S.C. § 172 ..... 2, 27

26 U.S.C. § 311 2

26 U.S.C. § 641 ..... 2, 9

TABLE OF AUTHORITIES – Continued

Page

26 U.S.C. § 1221 2
26 U.S.C. § 6012 ..... 2, 4, 5, 17
26 U.S.C. § 6034A 2, 16, 19
26 U.S.C. § 6151 4
26 U.S.C. § 6511 ..... 2, 14, 27, 28, 29
26 U.S.C. § 7122 28
26 U.S.C. § 7421 ..... 2, 8, 23, 24, 25
26 U.S.C. § 7422 ..... 2, 15
28 U.S.C. § 1254(1) (1988) 1
28 U.S.C. § 1291 ..... 10, 11
28 U.S.C. § 1340 ..... 2, 10, 11
28 U.S.C. § 1346 ..... 2, 11
28 U.S.C. § 2201 ..... 2, 3, 22

RULES AND REGULATIONS:

Revenue Ruling 72-436, 1972-2 C.B. 643 (1972) 17
Supreme Court Rule 12.4 1
Treasury Regulations, § 301.6511(d)-2 ..... 2, 28

OTHER AUTHORITIES:

H.R. Rep. No. 849, 1st Sess. 30 (1945), 1945 C.B. 566 28
IRS Litigation Bulletin No. 391, 1993 G.L.B. Lexis 8 (April 1993) 23
IRS General Litigation Bulletin No. 396, 1993 G.L.B. Lexis 4 (Sept. 1993) 23, 24

PETITION FOR A WRIT OF CERTIORARI

Theodore B. and Helen C. Gould (together, the "Goulds") and Holywell Corporation & Subsidiaries ("Holywell"), by their undersigned counsel, respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fourth Circuit in these cases. Because the two judgments involve certain identical and other closely related questions, the petitioners are submitting a single petition covering both judgments under Supreme Court Rule 12.4.

OPINIONS OF OTHER COURTS

The court of appeals' opinion in *Theodore B. and Helen C. Gould v. United States of America* (App. at 1-7), the court's denial of rehearing en banc (App. at 27), and the district court's opinion (App. at 15-19) are unreported. The court of appeals' opinion in *Holywell Corporation and Subsidiaries v. United States of America* (App. at 8-14), the court's denial of rehearing en banc (App. at 28), and the district court's opinion (App. at 21-25) are unreported.

JURISDICTION

The judgment of the court of appeals in *Gould v. United States* was entered on August 31, 2000 (App. at 1), and a timely petition for rehearing en banc was denied on October 27, 2000 (App. at 27). The judgment of the court of appeals in *Holywell v. United States* was entered on August 31, 2000 (App. at 8), and a timely petition for rehearing en banc was denied on October 30, 2000 (App. at 28). In both cases, the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTES AND REGULATIONS INVOLVED

The pertinent parts of the following statutes and regulations involved in this petition are appended commencing at App. 31: 11 U.S.C. § 101, 11 U.S.C. § 505, 11

U.S.C. § 1141, 26 U.S.C. § 172, 26 U.S.C. § 311 (prior to amendment by the Tax Reform Act of 1986), 26 U.S.C. § 641, 26 U.S.C. § 1221, 26 U.S.C. § 6012, 26 U.S.C. § 6034A, 26 U.S.C. § 6511, 26 U.S.C. § 7421, 26 U.S.C. § 7422, 28 U.S.C. § 1340, 28 U.S.C. § 1346, 28 U.S.C. § 2201, and Treas. Reg. § 301.6511(d)-2.

STATEMENT

Background. These cases involve the court of appeals' conclusions that, because of a settlement ("Settlement") entered into between Fred Stanton Smith ("Smith"), in his capacity as fiduciary of the Miami Center Liquidating Trust (the "trust"), and the Tax Division of the United States Justice Department ("Justice Department"), the Goulds' and Holywell's tax refund suits are barred by *res judicata*. The background to these cases is set forth in greater detail in the decision of this Court in *Holywell Corp. et al. v. Smith*, 503 U.S. 47 (1992).

As a result of a Chapter 11 bankruptcy proceeding involving the property of Theodore B. Gould ("Gould") and the estates of several separately taxable business entities which Gould owned or controlled, including Holywell and the Miami Center Limited Partnership ("MCLP"), the United States Bankruptcy Court for the Southern District of Florida (the "bankruptcy court") confirmed a plan of reorganization (the "Plan") on August 8, 1985, proposed by the debtors' primary creditor, the Bank of New York (the "Bank"), providing for a "modified form of substantive consolidation" of the debtors' estates. *See In re Holywell Corp.*, 54 B.R. 41, 43 (Bkrtcy. S.D. Fla. 1985). The Plan created the trust, and the bankruptcy court appointed Smith after confirmation to implement the Plan's provisions. *See Holywell*, 503 U.S. at 50.

On October 10, 1985, the Plan's effective date, title to certain assets of the debtors, including a real estate complex known as the Miami Center, the capital stock of Holywell and approximately $30 million of its cash, were

transferred to Smith under the Plan's terms, 503 U.S. at 51; the bankruptcy estates of Gould and Holywell also were terminated and the debtors discharged under 11 U.S.C. § 1141 as a result of confirmation. *Miami Center Limited Partnership v. The Bank of New York*, 838 F.2d 1547, 1552 (11th Cir. 1988).[1] Smith was required to liquidate and distribute the assets that he received under the Plan to satisfy certain pre-confirmation claims of the debtors' creditors, which transactions included the sale of the Miami Center to the Bank, with any remaining assets returning to the debtors pro rata. The Plan failed, however, to provide for the payment of federal income taxes. *Holywell*, 503 U.S. at 51. Concerned about his potential personal liability, Smith demanded and received an indemnity from the Bank. *See Smith v. Bank of New York*, 161 B.R. 302, 305 (Bkrtcy. S.D. Fla. 1993).

In December 1987 (more than two years after confirmation), Smith filed an action in the bankruptcy court under 28 U.S.C. § 2201(a), the Declaratory Judgment Act (App. at 49-50), requesting a determination that he had no duty to file federal income tax returns or pay federal income taxes. The bankruptcy court held that he was neither required to file returns nor pay income taxes. *In re Holywell Corp.*, 85 B.R. 898, 901 (Bkrtcy. S.D. Fla. 1988). The district court and the Eleventh Circuit Court of Appeals affirmed. *In re Holywell Corp.*, 911 F.2d 1539, 1545 (11th Cir. 1990). This Court unanimously reversed. *Holywell*, 503 U.S. at 52.

Smith's Independent Statutory Duties to File Returns Under this Court's Holywell Decision. While the Plan itself did not provide for the payment of federal income taxes,

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[1] Following the Plan's effective date, Holywell remained in business although its assets and legal title to Holywell's capital stock had been transferred to Smith under the Plan. *Holywell*, 503 U.S. at 51.

this Court held that, irrespective of the Plan, under independent IRC provisions of general application, Smith was required to file federal income tax returns and to pay federal income taxes on behalf of Holywell and the trust because "[t]he Internal Revenue Code ties the duty to pay federal income taxes to the duty to make an income tax return." 503 U.S. at 52. Therefore, as a result of the mandate of section 6151(a) of the Internal Revenue Code ("IRC"), that "when a return of a tax is required . . . the person required to make such return shall . . . pay such tax," the primary decision facing this Court in *Holywell* was whether, under the applicable IRC provisions, Smith was required to file returns on behalf of Holywell and the trust.

With respect to Holywell, this Court held that Smith's duty to file returns arose as a result of his being an "assignee" of Holywell's assets within the meaning of IRC section 6012(b)(3). However, because of the narrow issue presented, this Court declined to further consider whether, with respect to Holywell, Smith might also qualify as (a) a receiver, or (b) a trustee in a case under title 11 of the United States Code, for purposes of IRC section 6012(b)(3). *See* 503 U.S. at 53. ("Because the parties do not argue that the trustee's duties [i.e., to file returns] would differ under another characterization, we decline to consider whether the trustee would qualify as a receiver or bankruptcy trustee [with respect to Holywell].")[2]

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[2] Holywell maintains that, because Holywell was discharged and its "bankruptcy estate," created under 11 U.S.C. § 541(a), terminated as a result of the Plan's confirmation, and because Holywell continued thereafter to operate as an independent, viable corporate entity, Smith, who was not appointed until after the Plan's confirmation, could not under any scenario qualify as "a trustee under title 11" with respect to Holywell because there was no longer any "bankruptcy estate" of Holywell following the Plan's confirmation.

With respect to the trust, this Court held that Smith's duty to file returns arose as a result of his being "the fiduciary of a trust of an individual" under IRC section 6012(b)(4). 503 U.S. at 54. This Court concluded that because the Plan declared and established the new trust and vested legal title to the assets of Gould's estate to Smith, the Plan did not merely substitute Smith for Gould (who was originally debtor-in-possession) so that Smith was not the fiduciary of Gould's bankruptcy estate. 503 U.S. at 55.

Accordingly, this Court properly recognized in its *Holywell* decision that Smith took control of the debtors' assets in two distinct capacities. First, Smith was vested with legal title to the assets of Gould's estate, including his Holywell stock, as fiduciary of a newly created trust separate and distinct from Gould's bankruptcy estate that was established to satisfy certain pre-confirmation creditor claims, and with respect to which Gould was the beneficiary. 503 U.S. at 55-56. Second, Smith became an assignee of Holywell's assets. 503 U.S. at 53.

Federal Income Tax Consequences Following this Court's Holywell Decision. The IRS had taken the position upon its audit of MCLP in September 1989 that Smith's sale of the Miami Center to the Bank was a taxable event resulting in capital gains to Holywell in the amount of approximately $72 million attributable to Holywell's partnership interests in MCLP, which in turn owned the Miami Center. This IRS conclusion was based on the government's argument at that time that Smith was a "bankruptcy trustee" and that the trust, which held Holywell's assets, was a "bankruptcy estate."

After this Court's *Holywell* decision, holding that the trust was not a "bankruptcy estate," the IRS issued its Holywell Report on July 12, 1992, which report indicated that the Plan was a scheme to avoid the payment of taxes, and that the modified form of substantive consolidation under the Plan was not recognizable for federal income

tax purposes because there was no statutory basis for consolidating Holywell, a corporation, with MCLP, a partnership. As a result, the IRS concluded that the transfer of Holywell's property to Smith, following the transfer of the assets of Gould's estate, including his Holywell stock, to Smith pursuant to the Plan, represented for federal income tax purposes either (a) a misappropriation of Holywell's assets by Smith in his capacity as the trust's fiduciary, or (b) a dividend distribution by Holywell to Smith in his capacity as the trust's fiduciary and as Holywell's shareholder. Accordingly, the IRS effectively took the view that Smith, in his capacity as fiduciary of the trust, received Holywell's assets, which included Holywell's partnership interests in MCLP, in a separate transaction following Smith's receipt of Holywell's assets as an assignee.

Upon remand, the district court held that while the Bank was negligently liable for failing to provide for the payment of federal income taxes under the Plan, there was no evidence of fraud and therefore no misappropriation. *In re Holywell Corp.*, 177 B.R. 991, 998-99 (S.D. Fla. 1995). Accordingly, after that decision, only the alternative IRS position, i.e., that the "second-stage" transfer of Holywell's assets to Smith as the trust's fiduciary was a dividend distribution, remained viable.

In its Holywell Report, the IRS also took the position that Holywell had a capital gain in the amount of approximately $72 million resulting from the gain attributable to Holywell by reason of its partnership interests in MCLP, when Smith sold the Miami Center in his capacity as the trust's fiduciary. However, the IRS Report failed to recognize that, prior to August 1, 1986, under IRC section 311, *Taxability of corporation on distribution* (App. at 34-40), and this Court's decision in *General Utilities and Operating Co. v. Helvering*, 296 U.S. 200, 204 (1935), a "qualified dividend" by a corporation to its shareholders did not result

in any taxable income to the corporation,[3] and that the dividend distribution of Holywell's property to Smith was a "qualified dividend." Thus, following that dividend, any gain upon Smith's subsequent sale of the Miami Center could not be attributed to Holywell because title to the Miami Center was vested in Smith in his capacity as the trust's fiduciary. *Holywell*, 503 U.S. at 51. The Settlement and the IRS report upon which it relied therefore failed to reflect applicable tax law, and that is the principal basis upon which Holywell now seeks a tax refund.

The Proceedings upon Remand. After this Court's *Holywell* decision, the case was remanded to the district court and by it to the bankruptcy court for proceedings consistent with this Court's opinion. *Smith v. Holywell Corp.*, 965 F.2d 994 (11th Cir. 1992); Order, *United States v. Smith*, Nos. 88-0795, 88-1053 (S.D. Fla. March 25, 1993). On April 14, 1992, Smith, in his capacity as the trust's fiduciary, paid estimated income taxes in the amount of $2,920,000 attributable to a return of capital contribution and interest income received in 1991 on Gould's behalf from the Miami Center Joint Venture.[4] Gould consented to Smith's timely payment of these estimated taxes. Bkrtcy. S.D. Fla., C.P. #2319 (April 14, 1992).[5] This payment of estimated tax is what is now sought in the Goulds' suit for refund pursuant to the later application

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[3] IRC section 311 was amended by the Tax Reform Act of 1986, so that following August 1, 1986, a dividend of appreciated property does result in taxable income to a corporation.

[4] Smith also made other estimated tax payments during 1992, 1993 and 1994, which, when added to the amount paid with respect to the trust, totaled approximately $3,327,229.00.

[5] Because the amount of estimated tax payments correctly reflected the trust's tax liability for 1991-1993, the Settlement did not constitute, and did not purport to reflect, any "compromise" of the trust's (or the Goulds') tax liability.

of the Goulds' personal net operating loss carryovers. On January 5, 1993, the IRS issued a report on the trust asserting that Smith was responsible for the payment of $2,832,034.00 for the trust's tax years 1985-1991, which amount the trustee had previously paid as estimated taxes.

On June 4, 1993, Smith amended his Declaratory Judgment Act complaint to request that the bankruptcy court determine the *amount* of taxes he was required to pay. The United States filed a motion to dismiss, Motion By United States To Dismiss Or For Abstention, Adv. No. 87-0627-BKC-SMW-A (June 4, 1993) ("Motion To Dismiss Amended Complaint") (App. at 68-77), on the grounds that the bankruptcy court lacked jurisdiction under the Declaratory Judgment Act, and IRC section 7421, the Anti-Injunction Act (App. at 47-48), bars courts from entertaining any "suit for the purpose of restraining the assessment or collection of any tax."[6] The bankruptcy court denied the United States' motion, and the United States did not appeal.

On September 2, 1993, Smith and the Justice Department filed a joint motion in the bankruptcy court for approval of the Settlement (App. at 58-67), which purported to be a single joint compromise of the tax liabilities asserted by the IRS against Holywell, the bankruptcy estate of Gould, and the trust.[7] On September 30, 1993, the bankruptcy court approved the Settlement (App. at 54-57), which purported to compromise for $10 million the amount of taxes that the IRS assessed against Holywell, and provided that "the United States will retain the amounts previously paid by the trustee (approximately $3,327,229.00)" as estimated taxes (App.

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[6] The IRS agreed that the bankruptcy court did not have jurisdiction. *See* discussion *infra* at 23-25.

[7] The IRS never filed any claim with the bankruptcy court for any of the post-confirmation taxes alleged to have been due.

at 62-63). The Settlement did not compromise the amount of taxes that the IRS report claimed to be due from the trust, and Smith was relieved by the Justice Department of personal liability and of any responsibility for his failure to file tax returns for the trust for the tax years 1985 through 1992 or separately for Holywell.

Claims for Tax Refund. Because of Smith's failure to file federal income tax returns in connection with his status as fiduciary of the trust and as required by this Court's *Holywell* decision, petitioner Gould, as the trust's beneficiary, filed on April 7, 1997, *pro forma* Forms 1041, Fiduciary Income Tax Returns, and Schedules K-1, for the tax years ended December 31, 1985 through December 31, 1994. Petitioner Gould also filed Forms 1041-T, Allocation of Estimated Tax Payments to Beneficiaries, for the tax years ended December 31, 1991 through December 31, 1994, and amended Forms 1040 for the tax years ended December 31, 1985 through December 31, 1995. On October 15, 1997, the Goulds filed Form 1040 for the tax year ended December 31, 1996, seeking a tax refund in the amount of $3,000,412, which amount had been adjusted for income taxes due in prior years. The basis for the Goulds' claim for refund in 1996 is Smith's overpayment of federal income tax, as the trust's fiduciary, that results from the application of the Goulds' net operating loss carryovers. Because the application of such net operating loss carryovers reduces the Goulds' taxable income, the estimated tax payments made by Smith as the trust's fiduciary become tax overpayments which the Goulds are entitled to claim as a refund.[8]

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[8] While Gould originally agreed that the estimated tax payments made by Smith as the trust's fiduciary were correctly attributable to the trust's income, *see* IRC section 641(b) (App. at 40), the subsequent application of Gould's net operating loss carryovers to 1991 and 1992 reduce the correct amount of his income, and thereby cause the estimated tax payments to

On November 13, 1998, the Goulds filed their complaint seeking a refund in the amount of $3,000,412 in the United States District Court for the Western District of Virginia. The district court had original jurisdiction as a controversy under the internal revenue laws in accordance with 28 U.S.C. § 1340 (App. at 49). The United States filed a motion to dismiss on January 14, 1999. On July 16, 1999, the district court dismissed the complaint for failure to state a claim by reason of the doctrine of *res judicata* (App. at 20). The Goulds filed their appeal to the United States Court of Appeals for the Fourth Circuit on August 10, 1999. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

On July 14, 1995, Holywell filed a refund claim, in the amount of approximately $10 million for the fiscal year ended July 31, 1986, with respect to the income taxes Smith paid on October 12, 1993 in connection with the Settlement. The basis for Holywell's claim was that if substantive consolidation of the debtors' estates and the trust's creation was not a fraudulent scheme to avoid the payment of taxes (as determined by the IRS), and if the Plan was a lawful binding contract, *see Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir. 1988), *cert. denied*, 488 U.S. 823 (1988), then the transfer of Holywell's assets to Smith represented for federal income tax purposes (a) a taxable event because the trust was a separate taxable entity, and (b) a "qualified dividend" from Holywell to Smith, in his capacity as the trust's fiduciary and Holywell's stockholder (and following his receipt of Holywell's assets as an assignee), which did not result in any income to Holywell by reason of IRC section 311 (App. at 34-40) and this Court's decision in

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constitute a tax overpayment, which becomes a refundable tax payment credit. This application of net operating loss carryovers has never been considered by any court.

General Utilities. As a result, any gain upon Smith's subsequent sale of the Miami Center in his capacity as the trust's fiduciary could not be attributed to Holywell.

On November 10, 1997, Holywell filed its complaint in the United States District Court for the Western District of Virginia, seeking a refund of approximately $10 million. The district court had original jurisdiction as a controversy under the internal revenue laws in accordance with 28 U.S.C. § 1340 (App. at 49), and also had original jurisdiction, concurrent with the United States Claims Court, under 28 U.S.C. § 1346 (App. at 49) as an action for the refund of internal revenue taxes illegally assessed or collected. The United States filed a motion to dismiss on February 24, 1998. On August 26, 1998, the district court dismissed the complaint for failure to state a claim by reason of *res judicata* (App. at 26). Holywell filed a timely motion for reconsideration on September 1, 1998, which was denied on March 10, 1999 (App. at 29-30). Holywell filed its appeal to the United States Court of Appeals for the Fourth Circuit on March 15, 1999. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

The court of appeals' decisions in these tax refund cases are in conflict with and have failed to follow, *inter alia*, (a) this Court's *Holywell* decision, (b) its own decisions and those of other courts of appeals applying the doctrine of *res judicata* in connection with federal income tax disputes, (c) this Court's decisions, its own decisions and those of other courts of appeal, construing the limitations on adjudicating disputes under the Declaratory Judgment Act and the Anti-Injunction Act, and (d) in the case of the Goulds, express IRC provisions which specifically abrogate the doctrine of *res judicata* when applying net operating loss carrybacks.

In particular, the court of appeals, and the prior court decisions (on which it relied in finding *res judicata*), each

summarily continued to treat Smith as a "trustee under Title 11" (or a "bankruptcy trustee") and the trust as a "bankruptcy estate," despite this Court's express holdings to the contrary in *Holywell*. Such treatment not only dismisses this Court's analysis in *Holywell* as irrelevant, but also leads to the unjust dismissal of petitioners' refund claims while ignoring express IRC provisions, decisions of this Court construing those provisions, and the carefully established administrative procedures under which the federal income tax laws are enforced.

In almost identical opinions, the court of appeals held that each element of *res judicata* was present for purposes of precluding both the Goulds and Holywell from litigating their respective tax refund suits. In both cases, the court of appeals reasoned that the doctrine of *res judicata* applied to the Goulds and Holywell because:

> The prior bankruptcy suit (insofar as it determined the payment of the taxes at issue here) is identical to the instant refund suit. The trustee and the United States determined between themselves the proper amount of taxes to be paid. That very figure is the amount at issue in the case at bar. Accordingly, there is an identity of the cause of action. *Gould v. United States* at 4 (App. at 5); *Holywell v. United States* at 4 (App. at 11).

These hasty conclusions, for which the court of appeals cited no authority, are plainly erroneous and cannot withstand scrutiny.

In applying *res judicata* principles to tax cases, the general rule is that each tax year of a particular taxpayer is a separate cause of action. *Commissioner v. Sunnen*, 333 U.S. 591, 598 (1947). Thus, once a court has determined the tax liability of a particular taxpayer for a specific tax year, and its judgment has become final, *res judicata* generally precludes that taxpayer from relitigating any issue concerning his tax liability for that specific tax year. In such a case, however, *res judicata* has absolutely no effect

on a *different* taxpayer's ability to litigate his separate tax liability for the same or any other tax year.

1. *The Cause of Action in the Goulds' Refund Suit.* Under IRC section 641(b) (App. at 40), Smith was required to pay the taxes attributable to the trust's taxable income because he received income as a fiduciary of a trust of which Gould was the beneficial owner. 503 U.S. at 56. The Goulds, of course, are not the same taxpayer as the trust, and the Settlement did not purport to determine their personal income tax liability for any year. The Goulds remained liable for filing their own federal income tax returns, reflecting their own federal income tax liability, for each year covered by the Settlement.[9] It therefore cannot reasonably be contended that the cause of action in a judicial determination as to the tax liability of a trust (a separate taxpayer from its beneficiary), whether as a result of a full-blown trial or a court's approval of a settlement agreement, is the same cause of action involved in the trust beneficiary's suit for a refund of estimated taxes paid on his behalf by reason of income received on his behalf by the trust's fiduciary.

Moreover, because the underlying claims and the burden of proof in a trust beneficiary's tax refund action for 1996 are distinctly different from those in a determination of the amount of taxes that a fiduciary must pay on a trust's taxable income for 1985-1991,[10] *res judicata* is not applicable. Whether viewed as an exception to the

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[9] In 1994, the IRS audited the Goulds' joint federal income tax return for 1991, which was one of the tax years of the trust covered by the Settlement. The IRS thus recognized that the Settlement related only to the taxes that Smith, as a fiduciary, was required to pay for the trust's taxable income for 1985-1991, and had no binding effect on the Goulds' federal income tax liability for any of those years.

[10] In a tax refund suit, the claimant must prove, *inter alia*, that (a) a tax overpayment has been made, and (b) the taxes due for the year in which the overpayment occurred have been paid in full. *Flora v. United States*, 362 U.S. 145, 177 (1960).

doctrine of *res judicata* or as a method for determining if there is an identity of the cause of action, the result is the same: "[P]reclusive effect depends . . . on whether the same evidence is needed to support both claims, and whether the facts essential to the second were present in the first." *N.L.R.B. v. United Technologies Corp.*, 706 F.2d 1254, 1260 (2nd Cir. 1983). *See also United States v. Tatum*, 943 F.2d 370, 380-82 (4th Cir. 1991), *quoting United States v. Mumford*, 630 F.2d 1023, 1027 (4th Cir. 1980) ("[T]he difference between the present underlying claims with their differing elements and burdens of proof is so great that there exists two separate causes of action and litigation of one will not preclude the other under the doctrine of res judicata.").

This is particularly true where the later claim for refund is based on applying net operating loss carryovers which, in the case of carrybacks, cannot even be known until a later date. If a taxpayer's tax liability for a particular year is first determined and paid pursuant to a court's adjudication, a later suit for refund of those same taxes, based on net operating losses not known at the time of the adjudication, necessarily involves a separate and distinct cause of action based on the statutory deduction for net operating loss carryovers. In such case, the doctrine of *res judicata* simply does not apply. *See* IRC section 6511 (App. at 45-47); discussion, *infra* at 27-29.

2. *The Cause of Action in Holywell's Refund Suit.* The cause of action with respect to Holywell is its claim for a refund of taxes paid in 1993, based on the illegality of assessments against Holywell dating back to its fiscal year ending in 1986. Such cause of action also is clearly different from that adjudicated as part of the bankruptcy court's approval of the Settlement, which was a compromise of the taxes that Smith was required to pay as an assignee of Holywell's assets. Moreover, the cause of action in Holywell's refund suit did not arise, and could not have been sued upon, until the taxes sought to be refunded were in fact paid and a refund claim had been

filed in accordance with IRC section 7422(a) (App. at 48).[11] *See also* discussion, *infra* at 25-26.

3. *The Settlement Cannot Bind the Petitioners.* The court of appeals reliance on *United States v. Wilson*, 974 F.2d 514 (4th Cir. 1992), and other cases construing the *res judicata* effect of court-approved settlements ignores the analysis of this Court's *Holywell* decision and permits a bankruptcy court to issue orders in the name of expediency that conflict with express provisions of the Internal Revenue Code and the carefully crafted procedures under which it is administered.

After noting that court-approved settlements generally receive the same *res judicata* effect as litigated judgments, the court of appeals concluded that the bankruptcy court's approval of the Settlement constituted a "final judgment on the merits in a prior suit," *Gould v. United States* at 4 (App. at 5); *Holywell v. United States* at 3 (App. at 11), for purposes of barring the Goulds' and Holywell's suits for refund. While it may be true, in general, that "court-approved settlements receive the same res judicata effect as litigated judgments," *Gould v. United States* at 3 (App. at 4); *Holywell v. United States* at 3 (App. at 11), that does not mean that the bankruptcy court's approval of the Settlement here should receive the same *res judicata* effect with respect to the Goulds or Holywell as would a court-approved settlement to which the Goulds or Holywell were a party, a judgment actually

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[11] IRC section 7422(a) provides, in pertinent part, that:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed with the Secretary. . . .

litigated by the Goulds[12] or Holywell, or a settlement of the tax liability of a bankruptcy estate.

In *Wilson*, the court held that a bankruptcy court order approving a tax settlement between a bankruptcy trustee and the United States constituted a determination of the pre-petition tax liabilities of the bankruptcy estate even though the debtor objected to the settlement. A bankruptcy trustee does have the power to settle the pre-petition tax claims asserted by the IRS against a debtor's bankruptcy estate. However, as this Court held in *Holywell*, the trust was not a bankruptcy estate, and the bankruptcy estates of Gould and Holywell terminated on confirmation of the Plan in August 1985, *supra* at 3, whereas all taxes at issue here did not arise until 1986 and later years. 503 U.S. at 51.

Moreover, the other courts of appeals have held that tax compromises are subject to contract law. Thus, because Gould was not a contracting party, he cannot be personally bound by the Settlement. *United States v. Lane*, 303 F.2d 1, 4 (5th Cir. 1962) (tax compromises are subject to the general rules of contract); *United States v. Feinberg*, 372 F.2d 352, 361 (3rd Cir. 1967) (same); *accord Burrell v. Commissioner*, 400 F.2d 682 (10th Cir. 1968), *citing Lane*, 303 F.2d at 4. The Settlement neither did, nor could it, determine "the proper amount of taxes to be paid" with respect to the Goulds' separate tax liability for any year.

In the case of Holywell, Smith was an "assignee" of Holywell's property, and as a result was required to "file the returns that the corporate debtors would have filed had the plan not assigned [the corporation's] property to the trustee." *Holywell*, 503 U.S. at 54. In having this legal responsibility to file Holywell's returns and pay

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[12] A trust's beneficiary may always challenge the tax treatment of his trust, whether pursuant to a return or a settlement entered into by his fiduciary, by filing a notice of inconsistent treatment under IRC section 6034A (App. at 42-45).

Holywell's tax liability from the Holywell assets assigned to him, *id.* at 52, Smith's status as an assignee must not be confused with his separate, and legally unrelated, status as the fiduciary of the trust, which was an entirely separate taxpayer from Holywell. *Id.* at 55. Plainly, the trustee wore two hats, one as "assignee" of Holywell's property, and another as "fiduciary" of the trust, which held legal title to Holywell's stock.[13] While an assignee under IRC section 6012(b)(3) must file returns and pay tax on the transferor's behalf, an assignee has no power to enter into agreements on behalf of or otherwise bind the transferor.[14] *See* Rev. Rul. 72-436, 1972-2 C.B. 643 (1972) (transferee's compromise agreement does not compromise transferor's tax liability).

Moreover, the Plan did not provide for any payment of federal income taxes, *Holywell*, 503 U.S. at 57, so it is difficult to understand how the Plan could have provided Smith with the authority to compromise any tax liability. Rather, this Court, relying on separate provisions in the Internal Revenue Code, held that Smith had statutory duties not found in the Plan which required him to file

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[13] The court of appeals and the district court seem to have been confused by the fact that Smith, in his capacity as the trust's fiduciary, held legal (but not equitable) title to Holywell's stock. This Court held that Smith's duty to file returns and pay tax on the trust's behalf arose independently of his duties as an assignee, 503 U.S. at 54, and under a separate section of the Internal Revenue Code. *See IRC* secs. 6012(b)(3) & (4) (App. at 42). As the trust's fiduciary, Smith, a mere stockholder of Holywell, had no duty or power to file returns and/or pay tax on Holywell's behalf. Absent IRC section 6012(b)(3), relating to assignees, only a corporate officer (which Smith was not) could file returns and be responsible for paying taxes on Holywell's behalf.

[14] Nor does a fiduciary have the power to bind a separate corporate legal entity with respect to which he is only a stockholder.

tax returns and pay taxes on behalf of the trust and also of Holywell (out of its separate assets). 503 U.S. at 52. There is no statutory authority, however, enabling Smith, as assignee, to compromise Holywell's tax liabilities. Accordingly, it is incorrect to assume, as the court of appeals did, that Smith was legally enabled to enter into a compromise on Holywell's behalf, with the intent to bind Holywell without Holywell's consent. Holywell had been discharged in August 1985 and under the Plan was entitled to continue to engage in business without interference from Smith. 503 U.S. at 51.

Under the Settlement, Smith, as assignee of Holywell's assets, and the Justice Department agreed amongst themselves to a compromise of the amount of taxes alleged to be due with respect to Holywell. Holywell itself was not a party to the Settlement, and in fact was excluded from the negotiations which led to the Settlement. Moreover, the bankruptcy court did not make any "determination" regarding the tax alleged to be due. The correctness and legality of the assessment was never an issue. No record of the underlying tax issues purportedly compromised, and no tax return or IRS Report from which the Settlement parties' positions might be surmised, were ever produced in the bankruptcy court so as to permit Holywell to challenge the legality of the taxes assessed. Thus, Holywell was unable to defend its position as to its own tax liability in connection with the formation or approval of the Settlement, and cannot be deemed to be bound by it, *supra* at 16, citing *Lane*, 303 F.2d at 4 (tax compromises are contracts subject to the general rules of contract); *Feinberg*, 372 F.2d at 361; *accord Burrell v. Commissioner*, 400 F.2d 682. Instead, Smith, as an assignee, presumed to undermine Holywell's right to challenge its own tax liability by entering into a purported compromise of Holywell's tax liability, without

Holywell's participation, in exchange for Smith's release from personal liability as the trust's fiduciary.[15]

Smith, as assignee of Holywell's assets, was required to file a return on Holywell's behalf for the fiscal year ended July 31, 1995, and for the short year commencing August 1, 1985 and ending October 10, 1985, which he did not do.[16] Had he done so, the United States would be hard pressed to argue that Holywell could not later challenge any assessment pursuant to such returns in a suit for refund. The result is no different here where Holywell filed its own returns, in accordance with this Court's decision in *Holywell*, due to Smith's failure to do so.[17]

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[15] Smith, as assignee of Holywell's property, had a clear conflict of interest with Holywell (a defendant in the bankruptcy court proceedings) in light of Smith's exposure to personal liability in his separate capacity as the trust's fiduciary. Smith first received an indemnity from the Bank for any liability arising from Smith's handling of trust property, and then, pursuant to the Settlement, was expressly relieved of personal liability as a fiduciary, in exchange for his purported compromise of Holywell's alleged tax liabilities. *See Smith v. Bank of New York*, 161 B.R. at 305.

[16] Smith's status as assignee, and therefore his duty to file returns on Holywell's behalf, did not extent beyond the short taxable year in which the dividend distribution of Holywell's assets to the trust occurred. Thereafter, Smith, as fiduciary of the trust, was required to file a fiduciary income tax return for the trust and issue a Schedule K-1 to Gould as the trust's beneficiary, *see* IRC sec. 6034A (App. at 42-45), for the calendar year ended 1985 and until the trust was terminated on September 9, 1998.

[17] Every taxpayer, after filing returns on its own behalf, may pay tax pursuant to an assessment based on those returns, make a claim for refund and, if denied by the IRS, file a suit for refund challenging the assessment. The right and duty to file returns and pay taxes does not in any way restrict the continuing right to file a suit for refund, whether by reason of *res judicata* or any other doctrine.

The court of appeals simply did not understand the record in this case:

> The bankruptcy court approved this settlement in 1993 over Holywell's objection. . . . *Holywell v. United States* at 2-3 (App. at 10).
>
> . . . .
>
> Both the United States and Holywell were given an opportunity to voice their approval, or object to, the settlement, and both received full hearing of their arguments regarding the propriety of the settlement. Accordingly, there is an identity of the parties in the two suits. *Holywell v. United States* at 4 (App. at 12).

The truth is, however, that Holywell did not receive any hearing regarding the propriety of the Settlement; even the United States acknowledges this:

> Gould (but not Holywell) filed an objection to the proposed settlement. . . . [7]
>
> [7]Only Gould appeared at the hearing. . . . Holywell, which as a corporation must be represented by counsel . . . [citations omitted], could not appear through Gould. Brief, Eleventh Circuit Court of Appeals, Case Nos. 97-0023 & 97-0024.[18]

The court of appeals' misstatement of the facts is certainly cause to question its opinion, and the fact that Holywell was not represented when the bankruptcy court approved the Settlement requires the conclusion that due process was lacking in the proceedings so as to prevent *res judicata* from barring Holywell's suit for refund.

4. *The Bankruptcy Court Lacked Jurisdiction.* The decisions of the court of appeals are in conflict with the opinions of the other courts of appeal concerning the

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[18] The court of appeals' broad, inaccurate statements, confusing Gould with Holywell and referring to their actions as one and the same, shows at a minimum a haphazard analysis of these cases.

application of *res judicata* in proceedings involving the Declaratory Judgment Act and the Anti-Injunction Act. As discussed *supra* at 8, following remand from this Court, Smith filed an amended complaint requesting, for the first time, that the bankruptcy court determine the amount of taxes that he was required to pay.[19] The United States then filed its motion to dismiss, arguing that the bankruptcy court lacked jurisdiction under the Declaratory Judgment Act to determine the amount of post-confirmation taxes payable, and that the Anti-Injunction Act also prohibited the bankruptcy court from providing such a determination. The bankruptcy court denied the United States' motion, accepting jurisdiction under the Declaratory Judgment Act and despite the prohibition of the Anti-Injunction Act.[20]

The court of appeals held that the bankruptcy court's exercise of jurisdiction did not represent "a manifest abuse of authority" so as to render inapplicable the doctrine of *res judicata*. *Gould v. United States* at 5 (App. at 7); *Holywell v. United States* at 5 (App. at 13). The court

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[19] The proper path for Smith to have followed upon remand would have been to file the required federal income tax returns, as mandated by this Court's decision in *Holywell*, and after the Holywell Report was issued to seek a determination, through the administrative procedures of the Internal Revenue Service and thereafter in the United States Tax Court, of the amount of taxes he was required to pay. Prior to the Goulds' and Holywell's institution of these suits for refund, the United States agreed that this would have been the correct course upon remand. *See* Motion to Dismiss Amended Complaint (arguing that the bankruptcy court did "not have jurisdiction to determine the amount" of post-confirmation tax liabilities) (App. at 75-76). Based on this Court's *Holywell* opinion, the IRS also adopted this view. *See* discussion, *infra* at 23-25.

[20] In denying the United States' motion, the bankruptcy court effectively held that it had jurisdiction under 11 U.S.C. § 505. *See* discussion, *infra* at 22-23.

noted that "the question may be a close one," and that "both parties can make reasonable arguments on the question." Petitioners maintain that the question of the bankruptcy court's jurisdiction was not even a close issue and that the bankruptcy court's exercise of jurisdiction was a manifest abuse of authority. Petitioners also maintain that allowing the bankruptcy court's approval of the Settlement to be enforced substantially encroaches upon the authority of the U.S. Tax Court, the U.S. Court of Federal Claims, and the U.S. Congress, which encroachment also renders the doctrine of *res judicata* inapplicable.

Under the Declaratory Judgment Act, the bankruptcy court only has jurisdiction over federal taxes if the proceeding is under section 505 or section 1146 of the Bankruptcy Code. *See* 28 U.S.C. § 2201(a) (App. at 49-50).[21] Although upon first glance, section 505 of the Bankruptcy Code appears to provide that a bankruptcy court "may determine the amount or legality of any tax," 11 U.S.C. § 505(a)(1) (App. at 31), this provision has been construed to be limited to pre-confirmation tax consequences. *See Allis-Chalmers Corporation v. Goldberg (In re Hartman Material Handling Systems, Inc.)* 141 B.R. 802, 813 (Bkrtcy. S.D.N.Y. 1992). *See also United States v. Huckabee Auto Co.*, 783 F.2d 1546, 1549 (11th Cir. 1986); *In re Brandt-Airflex Corp. (Brandt-Airflex Corp. v. Long Island Trust Co., N.A.)*, 843 F.2d 90, 94-96 (2nd Cir. 1988).[22]

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[21] Section 1146 has no application here.

[22] Section 505 of the Bankruptcy Code permits a federal court to determine the tax liabilities only of a "debtor" or a "bankruptcy estate" as defined under the Bankruptcy Code. The trust was not a "debtor" because no case under Title 11 was ever commenced concerning the trust. *See* 11 U.S.C. § 101(13) (defining "debtor") (App. at 31).

The United States and the IRS have both supported this conclusion. *See* Motion to Dismiss Amended Complaint ("Since the plaintiff [Smith] is not seeking a determination of the tax liability of a debtor or a bankruptcy estate, Section 505 does not grant jurisdiction to the Court to determine the amount of the federal income tax liabilities of the plaintiff") (App. at 73); IRS General Litigation Bulletin No. 396, 1993 G.L.B. Lexis 4 (Sept. 1993) ("IRS Bulletin 396") (App. at 82-85). ("In accordance with the Supreme Court's decision [in *Holywell*], it is now our position that the [bankruptcy] court does not have jurisdiction over the post-confirmation tax consequences of . . . [a] liquidation trust), IRS Litigation Bulletin No. 391, 1993 G.L.B. Lexis 8 (April 1993) ("IRS Bulletin 391") (App. at 78-81) (the legislative history provides that section 505 was intended to limit the bankruptcy court to determinations of the tax liability of "the debtor").[23]

The Bankruptcy Court also lacked jurisdiction over the amended complaint by reason of the Anti-Injunction Act. Section 7421, Prohibition of suits to restrain assessment or collection (the Anti-Injunction Act) unequivocally provides that "no suit for the purpose of restraining the assessment or collection of any tax [or the liability of a transferee or fiduciary] shall be maintained in any court . . . " (App. at 47-48). Smith's amended complaint was a suit to restrain the assessment or collection of tax within the meaning of the Anti-Injunction Act, since the complaint requested that the bankruptcy court determine the amount of tax that he was required to pay rather than permitting the assessment and collection to occur as a result of normal IRS administrative procedures.

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[23] Notably, these IRS positions predated (a) Smith's filing of his amended complaint upon remand, (b) Smith's negotiations with the Justice Department, and (c) the bankruptcy court's approval of the Settlement.

The United States agreed that the Anti-Injunction Act barred the bankruptcy court from determining the amount of taxes Smith was required to pay. *See* Motion to Dismiss Amended Complaint ("The Court's intervention in the determination of tax liabilities of the plaintiff is barred by the Anti-Injunction Act. *See In re Heritage Village Church and Missionary Fellowship, Inc., (Clark) v. United States,* 851 F.2d 104 (4th Cir. 1988) (there is no general bankruptcy exception to the Anti-Injunction Act).") (App. at 74). The IRS also agreed that the Anti-Injunction Act prohibited the bankruptcy court from exercising jurisdiction. *See* IRS Bulletin 396 ("The Anti-Injunction Act also precludes the bankruptcy court from exercising jurisdiction over the merits of the trust's tax liability. 26 U.S.C. § 7421(a). The bankruptcy court does not have the discretion to interfere with the normal course of tax administration outside the explicit guidelines set forth in section 505(b).") (App. at 85). As the IRS Chief Counsel advised District Counsel, *citing In re American Bicycle Ass'n,* 895 F.2d 1277 (9th Cir. 1990), "[t]he limited exception which is sometimes applied in bankruptcy cases, is not applicable here because a remedy at law is available to the taxpayers and the liquidating trust by filing a return and utilizing the Service's normal administrative procedures if the Service does not accept the return as filed." IRS Bulletin 396 (App. at 85).

And finally, this Court's *Holywell* decision supports the conclusion that because, *inter alia,* a "creditor" is defined in the Bankruptcy Code as an entity with certain pre-confirmation claims, *see* 503 U.S. at 58; 11 U.S.C. § 101(10) (App. at 31), a bankruptcy court has no jurisdiction over post-confirmation tax matters. *See also Allis-Chalmers Corporation v. Goldberg (In re Hartman Material Handling Systems, Inc.)* 141 B.R. 802, 813 (Bkrtcy. S.D.N.Y. 1992) (relying on this Court's decision in *Holywell*); IRS Bulletin 396 ("[T]he last section of the Supreme Court's

decision in Holywell strongly suggests that the bankruptcy court's jurisdiction over tax matters does not go beyond confirmation of the plan; rather, post-confirmation tax consequences are beyond its reach.") (App. at 84).

5. *The Anti-Injunction Act Prohibited Holywell from Challenging the Assessment.* The court of appeals' conclusion that, for purposes of finding *res judicata*, Holywell "received full hearing of . . . [its] arguments regarding the propriety of the settlement," *Holywell v. United States* at 4 (App. at 12), and that the Settlement constituted "a final judgment on the merits" determining Holywell's tax liabilities, *Holywell v. United States* at 3 (App. at 11), ignores the fact that the Anti-Injunction Act specifically prevented Holywell from challenging the propriety of the Settlement, and from receiving a "determination" of its tax liabilities or any meaningful hearing before the bankruptcy court.[24] The court of appeals' failure to acknowledge this ignores that court's own precedent and the decisions of this Court addressing the relationship between a suit for refund and the Anti-Injunction Act.

As this Court held in *Enochs v. Williams Packing & Navigation, Inc.*, 320 U.S. 1, 7 (1962), the prohibition

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[24] *See* IRC section 7421 (App at 47-48). Moreover, the court's characterization of the facts in this regard is simply false. *See* discussion, *supra* at 20. Gould, on his own behalf and as beneficiary of the trust and not on Holywell's behalf, posed the only objection to the Settlement, challenging the legality of using trust assets to pay the tax liabilities of a separate taxpayer, i.e., Holywell, and not the underlying legality of the tax assessed against Holywell. *See Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215, 219 (1941) ("creditors of the corporation normally would be entitled to satisfy their claims out of corporate assets prior to any participation by the creditors of the stockholder."); *Bull v. United States*, 295 U.S. 247, 261 (1935) (retention of the funds of one taxpayer to pay taxes asserted against another taxable entity "amounts in law to a fraud on a taxpayer's rights").

against suit under the Anti-Injunction Act "require[s] that the legal right to the disputed sums be determined in a suit for refund." *See also Bob Jones University v. Simon*, 416 U.S. 725, 736, 742 (1974) (*Williams Packing* is the "capstone" for judicially construing the Anti-Injunction Act), *affm'g Bob Jones University v. Connally*, 472 F.2d 903, 906 (4th Cir. 1973) (where suit is prohibited by Anti-Injunction Act, the "remedy is to litigate the validity or amount of the tax by the statutory routes, i.e., appeal of assessment, or payment of the tax and suit for refund."). Despite the court of appeals statement to the contrary, the hearing approving the Settlement cannot reasonably be viewed as providing Holywell "an opportunity to voice . . . [its] approval of, or objections to, the settlement." *See also The Pittston Company v. United States*, 199 F.3d 694, 702 (4th Cir. 1999) (describing the interaction of the Anti-Injunction Act, the Declaratory Judgment Act, and a suit for refund; "The very purpose of the two statutes . . . is 'to allow the Federal Government to assess and collect allegedly due taxes without judicial interference and to compel taxpayers to raise their objections to collected taxes in suit for refunds.' ").

The bankruptcy court did not make any "determination" as to the legality of the taxes assessed against Holywell. No hearing to determine whether Holywell had any tax liability, or what the amount of such tax liability might be, was ever held. The amount of the assessment against Holywell, much less any details thereof, was never put in evidence. The court of appeal's conclusion on *res judicata* is therefore misplaced because, when viewed in conjunction with the earlier proceedings, it denies Holywell any remedy in any forum to contest the legality of the taxes assessed against it.[25]

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[25] The United States had opposed Gould's prior motion to enjoin Smith from using trust assets to pay taxes assessed against Holywell, arguing that Gould's motion was prohibited

6. *IRC Section 6511 Eliminates Any Res Judicata Effect for the Goulds.* The court of appeals appears not to have understood the mechanics of a refund claim that is based on net operating loss carryovers[26] and their relationship to principles of *res judicata*. Specifically, the court failed to consider that, even if the doctrine of *res judicata* otherwise would preclude the Goulds from prosecuting their suit for refund, IRC section 6511 (App. at 45-47) specifically abrogates that doctrine and its preclusive effect where a net operating loss carryback is at issue that was not specifically at issue in the prior proceeding. The court of appeals decision in *Gould v. United States* therefore renders meaningless IRC section 6511.

Because the amount of a net operating loss carryback cannot be known until a loss is incurred, IRC section 6511 provides a special period of limitations that keeps a previous tax year open for purposes of applying a net operating loss carryback, and statutorily negates the judicial doctrine of *res judicata* in the event that a net operating loss becomes available for carryback and for refund of taxes that have already been determined to be due and which have already been paid. This is true regardless of whether the amounts already determined to be due and already paid were determined and paid as estimated tax, payments with a final tax return, payment by agreement,

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under the bar of the Anti-Injunction Act, and the bankruptcy court ruled in the United States' favor.

[26] In general, a taxpayer is entitled to a refund if (a) an amount of tax was paid by or on behalf of the taxpayer, and (b) the taxpayer has net operating losses from other tax years that can, under IRC section 172 (App. at 34), be carried over to another tax year so as to create an overpayment of tax. In determining the amount of a net operating loss deduction for a particular tax year, both carryforwards and carrybacks are combined in each of the years to which they may be carried, with the amount of the net operating loss deduction for the year at issue generally representing the sum of both the carryforwards and carrybacks to such year.

or payment pursuant to a judgment, whether or not appealed, and if appealed, whether or not affirmed.

Under IRC section 6511(d)(2)(B), a timely filed refund claim is allowable based on a net operating loss carryback, even if such refund would be prevented by any "rule of law," other than a compromise under section 7122 (App. at 46).[27] For these purposes, a "rule of law" means, among others, the doctrine of *res judicata*. *See* H.R. Rep. No. 849, 1st Sess. 30 (1945), 1945 C.B. 566, 587 (App. at 53); *see also* Treas. Reg. § 301.6511(d)-2(b) (App. at 51-52); *Schrader v. Internal Revenue Service*, 1975-1 U.S.T.C. (CCH) 9215 (W.D. Ky. 1975) (even though plaintiff's tax liability for the years at issue were previously litigated, *res judicata* does not apply and plaintiff can claim refund for net operating loss carrybacks, provided that the taxpayer's net operating loss deduction was not previously litigated); *The Hanson Clutch & Machinery Co. v. United States*, 1972-1 U.S.T.C. (CCH) 9303 (N.D. Ohio 1972) (carryback which was not considered in determination pursuant to Tax Court settlement has no *res judicata* effect).

The Goulds have both net operating loss carryforwards and carrybacks which are combined in determining the amount of their net operating loss deduction for 1996, and their right to such carryovers clearly was not at issue in connection with the Settlement, nor was the Goulds' personal income tax liability for any tax year. Accordingly, the Goulds' right to seek a refund of taxes based on the application of their net operating loss carrybacks cannot be precluded under the doctrine of *res*

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[27] Mr. Gould was not a contracting party to the Settlement, and the compromise purportedly effected thereunder with respect to Holywell's tax liability has no binding effect on the Goulds' personal income tax liability. The Settlement did not even purport to have any effect on the Goulds' personal income tax liability. Compare the district court's finding of fact: "Plaintiffs Theodore and Helen Gould bring this action seeking a refund on the basis that their tax liability was overstated in a prior bankruptcy proceeding. . . . " (App. at 15).

judicata because, even if *res judicata* otherwise might apply, its effect is eliminated by the express terms of IRC section 6511 (App. at 45-47).[28]

7. *In a Declaratory Judgment Action, Res Judicata is Limited to the Relief Requested.* The decision of the court of appeals also is in conflict with the opinions of the other courts of appeals concerning the application of *res judicata* in an action for a declaratory judgment. In a declaratory judgment action, *res judicata* applies only to the relief requested. *See Harborside Refrigerated Services, Inc. v. Vogel*, 959 F.2d 368, 372 (2nd Cir. 1992) ("Many jurisdictions recognize an exception to ordinary res judicata principles where, as here, the prior action involved only a request for declaratory relief. Under this exception, the preclusive effect of the declaratory judgement is limited to the subject matter of the declaratory relief sought.") *See also Horn & Hardart & Co. v. National Rail Passenger Corp.*, 843 F.2d 546, 548-49 (D.C. Cir. 1988) ("Where a party asks only for declaratory relief, courts have limited the preclusive effect to the matters declared. . . . "); *Smith v. City of Chicago*, 820 F.2d 916, 919 (7th Cir. 1987), *citing Mandarino v. Pollar*, 718 F.2d 845, 848 (7th Cir. 1983) ("[A] declaratory action determines only what it actually decides and therefore does not have a claim preclusive effect on other contentions that might have been advanced.").

Thus, the bankruptcy court's approval of the Settlement, if otherwise treated as a determination of the taxes that Smith was required to pay, cannot result in *res judicata* preclusion with respect to either the Goulds' or

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[28] *Compare Kenny v. Quigg*, 820 F.2d 665, 669 (4th Cir. 1987), *quoting Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 328 (1955):

> [A] judgment "cannot be given the effect of extinguishing claims which did not even exist and which could not possibly have been sued upon in the previous case."

Holywell's suit for refund because the amended complaint for declaratory relief, pursuant to which the Settlement was approved, requested only a determination of the amount of taxes that Smith was required to pay as fiduciary of the trust.[29] And even if the court of appeals believed that Gould objected to the Settlement, which Gould denies,[30] Smith's action for a declaratory judgment certainly did not request that the bankruptcy court determine the Goulds' tax liabilities for any year.

There also must be findings of fact in a declaratory judgment action with regard to any issues that have a preclusive effect, and no such findings were present here. Thus, the court of appeals' opinions also conflict with this Court's opinion in *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 328 (1955), that "a judgment unaccompanied by findings of fact does not bind the parties on any issue arising in connection with another cause of action."

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT M. MUSSELMAN
Attorney for Petitioners
413 7th St., N.E.
P.O. Box 254
Charlottesville, VA 22902

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[29] The only issue before the bankruptcy court was the amount of taxes to be paid by Smith as fiduciary, a separate taxpayer from Gould, the trust's beneficiary, and Holywell. Neither the tax liability of the Goulds, nor the legality of the assessment against Holywell, were before the court, and the court could not have adjudicated their tax liabilities or their entitlement to a refund, had the issues been raised.

[30] Gould objected, not to Smith's payment of taxes as a fiduciary, but to the use of the trust's funds to pay tax liabilities asserted against Holywell.

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

THEODORE B. GOULD; HELEN C. GOULD, *Plaintiffs-Appellants;* v. UNITED STATES OF AMERICA, *Defendants-Appellee.*	No. 99-2113

Appeal from the United States District Court for the Western District of Virginia, at Charlottesville. Norman K. Moon, District Judge. (CA-98-107-3)

Argued: April 3, 2000

Decided: August 31, 2000

Before WIDENER, Circuit Judge, Claude M. HILTON, Chief United States District Judge for the Eastern District of Virginia, sitting by designation, and David A. FABER, United States District Judge for the Southern District of West Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Robert Metcalfe Musselman, ROBERT M. MUSSELMAN & ASSOCIATES, Charlottesville, Virginia,

for Appellants. Robert William Metzler, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Loretta C. Argrett, Assistant Attorney General, Bruce R. Ellisen, Robert P. Crouch, Jr., United States Attorney, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM

Theodore and Helen Gould appeal the dismissal of their suit for a refund of tax payments, arguing that the district court erred in determining that their suit was barred by the doctrine of res judicata. For the reasons adduced below, we affirm.

I.

Theodore Gould and several related corporate entities filed for Chapter 11 bankruptcy after a real estate venture in Miami, Florida, failed. The bankruptcy estates of the related entities were consolidated in a reorganization plan which created a liquidating trust. The liquidating trust was vested with all the assets of the debtors for distribution to creditors.

Soon thereafter, the trustee initiated an adversary proceeding to determine his obligation to file returns and pay tax on income generated by property in the liquidating trust. The United States Supreme Court held that the trustee was required to pay the tax due on the income attributable to the debtors' property vested in the liquidating trust. *See Holywell Corp. v. Smith*, 503 U.S. 47, 52 (1992). The case was remanded to the bankruptcy court, where, after extensive negotiations, the United States accepted an offer by the trustee to settle the income tax liabilities asserted against the trustee. The bankruptcy court approved this settlement in 1993 over Theodore Gould's objection. Gould appealed to the United States District Court for the Southern District of Florida and the United States Court of Appeals for the Eleventh Circuit, both of which affirmed. *See In re Holywell Corp.*, 177 B.R. 991 (S.D.Fla.1995); *Holywell Corp. v. Smith*, 208 F.3d 1009 (11th Cir. 2000) (unpublished, table).

In October 1997, Theodore and Helen Gould filed an income tax return for 1996 reporting a tax liability of $9,747. They claimed on the return estimated tax payments of $3,091,159 and sought a refund of $3,000,412. The Internal Revenue Service did not allow the claim for a refund, stating that the Goulds had made no estimated tax payments and still owed $9,747 for the 1996 tax year.

In November 1998, the Goulds filed this suit in the United States District Court for the Western District of Virginia, claiming that they were entitled to a refund of over three million dollars. The Goulds claim that the trustee of the liquidating trust paid over three million dollars in estimated taxes which should be credited to Mr. Gould as the beneficial owner of property transferred to

the trust. The district court granted the United States' motion to dismiss, holding that the Goulds' claim was barred by res judicata. The court reasoned that the Goulds were seeking a refund for taxes paid as a result of the settlement approved by the bankruptcy court, and were therefore barred from bringing their claim in the district court.

II.

The Goulds argue that the bankruptcy court's approval of the tax settlement is not entitled to preclusive effect because the necessary elements of res judicata are not met. A party invoking res judicata must establish three elements: 1) a final judgment on the merits in a prior suit, 2) an identity of the cause of action in both the earlier and the later suit, and 3) an identity of parties or their privies in the two suits. *See Meekins v. United Transportation Union*, 946 F.2d 1054, 1057 (4th Cir. 1991).

Generally, court-approved settlements receive the same res judicata effect as litigated judgments. *See Hoxworth v. Blinder*, 74 F.3d 205, 208 (10th Cir. 1996); *accord In re Medomak Canning*, 922 F.2d 895, 900 (1st Cir. 1990); *cf. United States v. Wilson*, 974 F.2d 514 (4th Cir. 1992) (holding that bankruptcy court order approving tax settlement between bankruptcy trustee and the United States constituted determination of tax liabilities of debtor's estate even though debtor objected to settlement). The Goulds are claiming a refund of taxes paid by the trustee of the liquidating trust. The amount of taxes owed was settled by agreement between the trustee and the United States and was confirmed by the bankruptcy court. Because the

settlement was approved by court order in a case now final, the earlier settlement order represents a final judgment on the merits in a prior suit.

The prior bankruptcy suit (insofar as it determined the payment of the taxes at issue here) is identical to the instant refund suit. The trustee and the United States determined between themselves the proper amount of taxes to be paid. That very figure is the amount at issue in the case at bar. Accordingly, there is an identity of the cause of action.

There is also an identity of the parties in the earlier bankruptcy action and the current case. The United States and Theodore Gould were both named as defendants in the trustee's adversary proceeding. Both the United States and Gould were given an opportunity to voice their approval of, or objections to, the settlement, and both received full hearing of their arguments regarding the propriety of the settlement. As to Helen Gould, she is apparently named as a plaintiff in this lawsuit merely because she filed a joint tax return with her husband, Theodore Gould. Thus Helen Gould's claim is derivative of Theodore Gould's claim. Accordingly, there is an identity of the parties in the two suits, and each element of res judicata is present.

III.

The Goulds argue that, regardless of the above discussion, the bankruptcy court's order cannot be accorded res judicata effect because the bankruptcy court was not a

court of competent jurisdiction to determine the tax liability of the liquidating trust. This argument amounts to a collateral attack on the bankruptcy court's jurisdiction.

"For federal judgments, lack of subject matter jurisdiction generally has no bearing on the preclusive effect of a judgment." 18 James Wm. Moore et al., *Moore's Federal Practice* § 131.30(1)(d)(iii) (1999 3d ed.). Further, "[f]ederal courts have the authority to determine whether they have jurisdiction, and '[t]heir determinations of such questions, while open to direct review, may not be assailed collaterally.' " *In re Bulldog Trucking, Inc.*, 147 F.3d 347, 352 (4th Cir. 1998) (quoting *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940)).

This general rule of finality is open only to narrow exceptions, and "[m]ere error in the exercise of jurisdiction will not render a prior judgment invalid." *Bulldog Trucking*, 147 F.3d at 352. The exceptions to the rule of finality are situations where 1) the exercise of jurisdiction constitutes a manifest abuse of authority, 2) allowing the challenged judgment to stand would substantially encroach upon the authority of another tribunal or agency of government, or 3) the judgment was rendered by a court lacking capability to make an adequately informed determination as to its own jurisdiction. *See In re Bulldog Trucking, Inc.*, 147 F.3d 347 (4th Cir. 1998) (adopting *Restatement (Second) of Judgments* § 12 (1982)).

Neither the second nor the third exceptions are at issue here, but both parties have devoted significant argument to the first exception. Both parties make detailed argument on the issue of whether the bankruptcy court did or did not have jurisdiction to resolve

the question of the amount of the trustee's tax liability. And indeed the question may be a close one. However, the very fact that both parties can make reasonable arguments on the question suggests that the exercise of jurisdiction by the bankruptcy court could not be "a manifest abuse of authority." Accordingly, we find that the question of whether the bankruptcy court properly exercised jurisdiction over the tax liability question does not alter the res judicata effect of the bankruptcy court's approval of the settlement between the trustee and the United States.

IV.

For the foregoing reasons, the district court properly dismissed the Goulds' claim on res judicata grounds. We therefore affirm the district court.

AFFIRMED

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HOLYWELL CORPORATION & SUBSIDIARIES, *Plaintiff-Appellant,* v. UNITED STATES OF AMERICA, *Defendant-Appellee.*	No. 99-1399

Appeal from the United States District Court
for the Western District of Virginia, at Charlottesville.
James C. Turk, District Judge.
(CA-97-131-3-C)

Argued: April 3, 2000

Decided: August 31, 2000

Before WIDENER, Circuit Judge,
Claude M. HILTON, Chief United States District Judge
for the Eastern District of Virginia, sitting by
designation, and David A. FABER, United States District
Judge for the Southern District of West Virginia,
sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Robert Metcalfe Musselman, ROBERT M. MUSSELMAN & ASSOCIATES, Charlottesville, Virginia,

for Appellant. Robert William Metzler, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Loretta C. Argrett, Assistant Attorney General, Robert P. Crouch, Jr., United States Attorney, Bruce R. Ellisen, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Holywell Corporation appeals the dismissal of its suit for a refund of tax payments, arguing that the district court erred in determining that its suit was barred by the doctrine of res judicata. For the reasons adduced below, we affirm.

I.

Holywell Corporation (Holywell) filed for Chapter 11 bankruptcy after a real estate venture in Miami, Florida, failed. The bankruptcy estates of the related entities were consolidated in a reorganization plan which created a liquidating trust. The liquidating trust was vested with all the assets of the debtors for distribution to creditors.

Soon thereafter, the trustee initiated an adversary proceeding to determine his obligation to file returns and

pay tax on income generated by property in the liquidating trust. The United States Supreme Court held that the trustee was required to pay the tax due on income attributable to the debtors' property in the liquidating trust. *See Holywell Corp. v. Smith*, 503 U.S. 47, 52 (1992). The case was remanded to the bankruptcy court, where, after extensive negotiations, the United States accepted an offer of settlement by the trustee to settle the income tax liabilities. The bankruptcy court approved this settlement in 1993 over Holywell's objection. Holywell appealed to the United States District Court for the Southern District of Florida and the United States Court of Appeals for the Eleventh Circuit, both of which affirmed. *See In re Holywell Corp.*, 177 B.R. 991 (S.D. Fla.1995); *Holywell Corp. v. Smith*, 208 F.3d 1009 (11th Cir. 2000) (unpublished, table).

In November of 1997, Holywell filed this suit in the United States District Court for the Western District of Virginia, claiming that it is entitled to a refund of over 10.6 million dollars. Holywell claims that the trustee of the liquidating trust paid that amount in taxes which should be credited to Holywell as beneficial owner of property transferred to the trust. The district court granted the United States' motion to dismiss, holding that Holywell's claim was barred by res judicata. The court reasoned that Holywell was seeking a refund for taxes paid as a result of the settlement approved by the bankruptcy court, and was therefore barred from bringing its claim in the district court.

II.

Holywell argues that the district court erred in determining that its claim is barred by the doctrine of res judicata. A party invoking res judicata must establish three elements: 1) a final judgment on the merits in a prior suit, 2) an identity of the cause of action in both the earlier and the later suit, and 3) an identity of parties or their privies in the two suits. *See Meekins v. United Tranportation Union*, 946 F.2d 1054, 1057 (4th Cir. 1991).

Generally, court-approved settlements receive the same res judicata effect as litigated judgments. *See Hoxworth v. Blinder*, 74 F.3d 205, 208 (10th Cir. 1996); *accord In re Medomak Canning*, 922 F.2d 895, 900 (1st Cir. 1990); *cf. United States v. Wilson*, 974 F.2d 514 (4th Cir. 1992) (holding that bankruptcy court order approving tax settlement between bankruptcy trustee and the United States constituted determination of tax liabilities of debtor's estate even though debtor objected to settlement). Holywell is claiming a refund of taxes paid by the trustee of the liquidating trust. The amount of taxes owed was settled by agreement between the trustee and the United States and was confirmed by the bankruptcy court. Because the settlement was approved by court order in a case now final, the earlier settlement order represents a final judgment on the merits in a prior suit.

The prior bankruptcy suit (insofar as it determined the payment of the taxes at issue here) is identical to the instant refund suit. The trustee and the United States determined between themselves the proper amount of taxes to be paid. That very figure is the amount at issue in the case at bar. Accordingly, there is an identity of the cause of action.

There is also an identity of the parties in the earlier bankruptcy action and the current case. The United States and Holywell were both named as defendants in the trustee's adversary proceeding. Both the United States and Holywell were given an opportunity to voice their approval, or object to, the settlement, and both received full hearing of their arguments regarding the propriety of the settlement. Accordingly, there is an identity of the parties in the two suits, and each element of res judicata is present.

III.

Holywell argues that, regardless of the above discussion, the bankruptcy court's order cannot be accorded res judicata effect because the bankruptcy court was not a court of competent jurisdiction to determine the tax liability of the liquidating trust. This argument amounts to a collateral attack on the bankruptcy court's jurisdiction.

"For federal judgments, lack of subject matter jurisdiction generally has no bearing on the preclusive effect of a judgment." 18 James Wm. Moore et al., *Moore's Federal Practice* § 131.30(1)(d)(iii) (1999 3d ed.). Further, "[f]ederal courts have the authority to determine whether they have jurisdiction, and '[t]heir determinations of such questions, while open to direct review, may not be assailed collaterally.' " *In re Bulldog Trucking, Inc.*, 147 F.3d 347, 352 (4th Cir. 1998) (quoting *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940)).

This general rule of finality is open only to narrow exceptions, and "[m]ere error in the exercise of jurisdiction will not render a prior judgment invalid." *Bulldog*

Trucking, 147 F.3d at 352. The exceptions to the rule of finality are situations where 1) the exercise of jurisdiction constitutes a manifest abuse of authority, 2) allowing the challenged judgment to stand would substantially encroach upon the authority of another tribunal or agency of government, or 3) the judgment was rendered by a court lacking capability to make an adequately informed determination as to its own jurisdiction. *See In re Bulldog Trucking, Inc.*, 147 F.3d 347 (4th Cir. 1998) (adopting *Restatement (Second) of Judgments* § 12 (1982)).

Neither the second nor the third exceptions are at issue here, but both parties have devoted significant argument to the first exception. Both parties make detailed argument on the issue of whether the bankruptcy court did or did not have jurisdiction to resolve the question of the amount of the trustee's tax liability. And indeed the question may be a close one. However, the very fact that both parties can make reasonable arguments on the question suggests that the exercise of jurisdiction by the bankruptcy court could not be "a manifest abuse of authority." Accordingly, we find that the question of whether the bankruptcy court properly exercised jurisdiction over the tax liability question does not alter the res judicata effect of the bankruptcy court's approval of the settlement between the trustee and the United States.

IV.

For the foregoing reasons, the district court properly dismissed Holywell's claim on res judicata grounds. We therefore affirm the district court.

We note that appellant has moved to file a reply brief containing material unauthorized by the rules. That motion is hereby denied as moot. The unauthorized material pertains to an argument that has not been and need not be addressed herein.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

THEODORE B. GOULD and HELEN C. GOULD Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	)	CIVIL ACTION NO. 3:98-CV-0107 MEMORANDUM OPINION (Filed Jul 16, 1999) JUDGE NORMAN K. MOON

This case is before the Court on a motion to dismiss by defendant United States of America. Plaintiffs are seeking a refund of taxes paid to the Internal Revenue Service (I.R.S.) pursuant to a settlement between the Trustee of the Miami Center Liquidating Trust, of which Theodore Gould was a major shareholder, and the I.R.S. For reasons set forth below, this Court GRANTS defendant's motion to dismiss.

I. BACKGROUND

Plaintiffs Theodore and Helen Gould bring this action seeking a refund on the basis that their tax liability was overstated in a prior bankruptcy proceeding brought before the United States Bankruptcy Court for the Southern District of Florida in August of 1984. 28 U.S.C. § 1340. This is the second action brought by Theodore Gould to recover a refund from the government. The first action was filed with this Court in 1998 and decided by James C.

Turk, U.S. District Judge. *See Holywell Corporation & Subsidiaries v. United States of America,* Civil Action No. 97-0131-C (1998). Though the party names may be different, the facts are the same and the Court will only make a brief recitation of the facts pertinent to this action.

Theodore Gould is 100 percent stockowner of Holywell Corporation. In August 1984, Holywell and other related entities filed petitions in the United States Bankruptcy Court for the Southern District of Florida in response to a foreclosure proceeding against real estate owned by Holywell and the related entities. In August 1985, the bankruptcy court approved a plan of reorganization which provided for the creation of the Miami Center Liquidating Trust ("the Miami Trust"). In that proceeding, Fred Stanton Smith was appointed as the Trustee of the Miami Trust. Smith filed an Adversary Proceeding in the bankruptcy court to determine whether he was required to file federal income tax returns, and if so, in what amounts. Ultimately, the issue was litigated and the Supreme Court held on appeal that the Trustee was required to file federal income tax returns and to pay the resulting tax liability. *Holywell Corp. v. Smith,* 503 U.S. 47 (1992).

In July of 1992, the I.R.S. asserted a tax liability against the Trustee on behalf of Holywell Corporation and related subsidiaries. The I.R.S. also issued reports asserting federal tax liabilities in excess of $30 million against Gould's bankruptcy estate and the Miami Trust. The Trustee disputed the amount due. Eventually, the I.R.S. and the Trustee reached a settlement where the Trustee agreed to pay the I.R.S. $10 million. In addition,

the Trustee agreed that the I.R.S. could retain approximately $3.3 million previously paid by the Trustee.

In September of 1993, the bankruptcy court conducted a hearing to approve the settlement. Over the objections of Holywell and Gould, the court approved the settlement. Gould asserts that the Trustee improperly paid certain taxes which should have been credited to Gould based on the carryforward of Holywell's net operating losses. The Goulds now seek a tax refund of more than $3,000,000 based on the amount due as the result of this allegedly improper settlement agreement in the bankruptcy proceeding in order to offset their 1996 federal income tax liability.

II. DISCUSSION

When considering a motion to dismiss under Fed.R.Civ.P. 12(b)(6), this Court must consider all facts and reasonable inferences which may be drawn from the face of the plaintiff's complaint to determine whether all of the required elements of the cause of action are present. *Oram v. Dalton*, 927 F. Supp. 180, 184 (E.D. Va. 1996) (citing *Wolman v. Tose*, 467 F.2d 29, 33 n.5 (4th Cir. 1972)). This means that the court must examine whether it could grant relief under any set of facts that the plaintiff could prove consistent with his allegations. *Revene v. Charles County Comm'rs.*, 882 F.2d 870, 872 (4th Cir. 1989).

Defendant has moved to dismiss plaintiffs' claim for a tax refund as barred by the doctrine of *res judicata*. *Res judicata* bars subsequent relitigation of an issue decided in a prior proceeding. *Allen v. McCurry*, 449 U.S. 90, 94

(1980); *Federal Deposit Ins. Corp. v. Jones*, 846 F.2d 221, 234-35 (4th Cir. 1988). This doctrine applies to all proceedings, including the decisions of bankruptcy courts. *Turshen v. Chapman*, 823 F.2d 836, 839 (4th Cir. 1987); *Brown v. Felsen*, 442 U.S. 127, 132 (1979). Because Theodore Gould's tax liability was determined in a settlement proceeding before a United States Bankruptcy Court in Florida, this matter is considered an issue previously litigated. *See In re Petitioning Creditors of Melon Produce, Inc.*, 112 F.3d 1232, 1240 (1st Cir. 1997).

The plaintiffs claim that the current proceeding is different because they are petitioning this Court as individuals and not as part of Holywell Corporation. However, the issues are exactly the same. Plaintiffs seek a refund for taxes paid as the result of the settlement that was approved by the bankruptcy court. At that time, Gould personally noted his objection to the settlement plan prior to its approval by the bankruptcy court and he is attempting to attack the outcome of that plan once again.

Plaintiffs also challenge the jurisdiction of the Florida bankruptcy court to have determined the tax liability of Holywell and its related subsidiaries. However, that issue is still on appeal before the United States Court of Appeals for the Eleventh Circuit. Until the Eleventh Circuit makes a determination, the bankruptcy court's decision constitutes a final decision on the merits. Allowing plaintiffs to proceed in this court prior to that time would constitute an impermissible collateral attack on the judgment of the bankruptcy court. *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995). Therefore, this Court holds that

res judicata bars plaintiffs from bringing their claims in this court.

For these reasons, the Court will grant defendant's motion to dismiss. The Clerk of the Court is directed to send a copy of this Memorandum Opinion to all counsel of record and strike this case from the docket.

ENTERED: /s/ Norma K. Moon
U.S. District Judge

JUL 16 1999
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

THEODORE B. GOULD and HELEN C. GOULD	)	CIVIL ACTION NO. 3:98-CV-0107
Plaintiffs,	)	ORDER
v.	)	(Filed July 16, 1999)
UNITED STATES OF AMERICA,	)	JUDGE NORMAN K. MOON
Defendant.	)	

This case is before the Court on a motion to dismiss by defendant United States of America. For reasons set forth in the accompanying memorandum opinion, this Court finds that plaintiff's claim is barred by the doctrine of *res judicata*. Therefore, it is hereby

ADJUDGED AND ORDERED

that defendant's motion to dismiss is GRANTED. Consequently, the Court will dismiss all other pending motions. The Clerk of the Court is directed to send a copy of this Order and the Memorandum Opinion to all counsel of record and strike this case from the docket.

ENTERED: /s/ Norman K. Moon
U.S. District Judge

JUL 16 1999
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

HOLYWELL CORPORATION & SUBSIDIARIES,	)	**Civil No. 97-0131-C**
Plaintiffs,	)	**MEMORANDUM OPINION**
V.	)	**(Filed Aug. 26, 1998)**
UNITED STATES OF AMERICA	)	**By: Hon. James C. Turk, United States District Judge**
Defendant.	)	

This matter is before the Court on defendant's motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). Plaintiff Holywell Corporation and subsidiaries ("Holywell") bring this action seeking an income tax refund on the basis that its tax liability was overstated in a prior bankruptcy proceeding. 28 U.S.C. § 1340. Plaintiff responded to defendant's motion to dismiss, and the Court heard oral arguments on the motion. Upon consideration of the record, the arguments of counsel, and the applicable law, the Court will grant defendant's motion to dismiss.

I.

This matter concerns the determination of plaintiff's income tax liability which arose pursuant to a bankruptcy proceeding brought before the United States Bankruptcy Court for the Southern district of Florida in August of 1984. In that proceeding, Fred Stanton Smith was appointed as the Trustee of a Trust consisting of the assets of the

debtors, Holywell and several related entities. Plaintiff seeks a tax refund of $10, 652, 081, which the Trustee paid to the Internal Revenue Service in September of 1993 to resolve various tax liabilities of the debtors, pursuant to a settlement between the Trustee and the Internal Revenue Service.

In October of 1985, the Trustee filed an Adversary Proceeding in the Bankruptcy Court to determine whether he was required to file federal income tax returns and if so, what amount of income tax was owed. Over the opposition of the United States and Holywell, the Bankruptcy Court granted the Trustee's request for a declaratory judgement that the Trustee had no duty to file returns or pay income tax. *In re Holywell Corp.*, 85 B.R. 898 (S.D. Fla. 1988). The judgement was affirmed by the United States District Court for the Southern District of Florida and the United States Court of Appeals for the Eleventh Circuit. *In re Holywell Corp.*, 911 F.2d 1539 (11th Cir. 1990). However, the Supreme Court reversed the lower courts, ruling that the Trustee was required to file federal income tax returns and to pay the resulting tax liability. *Holywell Corp. v. Smith*, 503 U.S. 47 (1992).

In July of 1992, the Internal Revenue Service asserted a tax liability against the Trustee on behalf of Holywell for approximately $26 million. The Trustee disputed the amount. After settlement negotiations failed, the Bankruptcy Court scheduled a trial to resolve the dispute. The Trustee and the Internal Revenue Service then reached a settlement pursuant to which the Trustee would pay the Internal Revenue Service $10 million. Additionally, the Internal Revenue Service would retain approximately

$3.3 million the Trustee had previously paid. The settlement resolved various tax liabilities for Holywell and its subsidiaries.

In September of 1993 a hearing to approve the settlement was held before the Bankruptcy Court in the Southern District of Florida. After hearing testimony and considering the objections of Holywell and Theodore Gould, 100 % stockowner of Holywell, the Bankruptcy court entered an Order approving the settlement. Pursuant to such order, the Trustee paid $10 million to the Internal Revenue Service. Holywell contends that the Trustee's sale of real estate in October of 1985 was not a taxable event, thus Holywell did not have a tax liability during the years ending July 31, 1985 and July 31, 1986. On this basis, Holywell contends it is entitled to a tax refund for the $10 million that the Trustee paid to the Internal Revenue Service.

II.

A motion to dismiss under Fed R Civ P 12(b)(6) should not be granted unless it is clear as a matter of law that after accepting the facts alleged in the complaint to be true and construing the allegations in the light most favorable to the plaintiff, the Court could not grant relief under any set of facts that the plaintiff could prove consistent with his allegations. *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984); *Revene v. Charles County Comm'rs.* 882 F.2d 870, 872 (4th Cir. 1989).

Defendant has moved to dismiss plaintiff's claim that it is entitled to a tax refund, because the issue of plaintiff's tax liability was previously litigated in the United

States Bankruptcy Court of the Southern District of Florida. Defendant asserts that the plaintiff is barred under the doctrine of res judicata from relitigating the amount of its tax liability in this proceeding. The Court agrees with defendant's contention. Therefore, plaintiff has failed to state a claim upon which relief may be granted, and the complaint should be dismissed according to Fed. R. Civ. P. 12(b)(6).

The doctrine of res judicata bars subsequent relitigation of an issue decided in a prior proceeding. *Allen v. McCurry*, 449 U.S. 90, 94 (1980). This doctrine applies to decisions of the bankruptcy courts. *Turshen v. Chapman*, 823 F.2d 836, 839 (4th Cir. 1987). The plaintiff's tax liability was determined in a proceeding before the United States Bankruptcy Court for the Southern District of Florida approving a settlement plan which resolved plaintiff's income tax liabilities for the years ending July 31, 1985 through July 31, 1993. Plaintiff noted its objection to the settlement plan prior to its approval by the Bankruptcy Court. Therefore, plaintiff's attempt to relitigate the issue of its tax liability for the years ending July 31, 1985 and July 31, 1986 in this Court is barred.

In addition, Plaintiff challenges the jurisdiction of the bankruptcy court to determine their tax liability. However, this issue is on appeal before the United States Court of Appeals for the Eleventh Circuit. Permitting plaintiff to pursue their jurisdictional claim in this court would allow an impermissible collateral attack on the judgment of the bankruptcy court. *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995).

III.

For the reasons stated above, the Court will grant defendant's motion to dismiss the complaint pursuant to Rule 12(b)(6).

The Clerk is directed to send certified copies of this Memorandum Opinion and the accompanying Order to all counsel of record.

ENTER: This 25th day of August, 1998

/s/ James C. Turk
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

HOLYWELL CORPORATION & SUBSIDIARIES,	)	**Civil No. 97-0131-C**
Plaintiffs,	)	**FINAL ORDER (Filed Aug. 26, 1998)**
V.	)	**By: Hon. James C. Turk, United States District Judge**
UNITED STATES OF AMERICA	)	
Defendant.	)	

For the reasons stated in the accompanying Memorandum Opinion, it is hearby

ADJUDGED AND ORDERED

that defendant's motion to dismiss the complaint pursuant to Rule 12(b)(6) is **GRANTED.**

The clerk of the Court is directed to strike this matter from the active docket of the Court and to send certified copies of this Order and the accompanying Memorandum Opinion to counsel of record for the parties.

ENTER: This 25th day of August, 1998

/s/ James C. Turk
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-2113
CA-98-107-3

THEODORE B. GOULD; HELEN C. GOULD

Plaintiffs - Appellants

v.

UNITED STATES OF AMERICA

Defendant - Appellee

On Petition for Rehearing En Banc

(FILED October 27, 2000)

The appellants' petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-1399
CA-97-131-3-C

HOLYWELL CORPORATION & SUBSIDIARIES

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA

Defendant - Appellee

On Petition for Rehearing En Banc

(FILED October 30, 2000)

The appellant's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc, IT IS ORDERED that the petition for rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

HOLYWELL CORPORATION & SUBSIDIARIES,	)	**Civil No. 97-0131-C**
Plaintiffs,	)	**FINAL ORDER**
v.	)	**(Filed Mar 10 1999)**
UNITED STATES OF AMERICA	)	**By: James C. Turk, United States District Judge**
Defendant.	)	

Plaintiffs Holywell Corporation and Subsidiaries moved this Court to reconsider its Final Order and Memorandum Opinion, entered on August 25, 1998, granting the United States of America's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

On February 26, 1999, this Court heard arguments on plaintiffs' motion to reconsider. During the hearing plaintiffs repeated many of the arguments that were made at the initial hearing and in their pleadings concerning their belief that the Bankruptcy Court for the Southern District of Florida lacked subject matter jurisdiction when it acted to approve the settlement of the tax liabilities asserted by the United States against plaintiffs. For reasons stated in its original Memorandum Opinion, this court has determined the jurisdictional matter is best raised concurrent with plaintiffs' appeal which is pending in the Eleventh Circuit.

It is, accordingly,

ADJUDGED AND ORDERED

that the plaintiff's motion for reconsideration is **DENIED.**

The Clerk of the Court is directed to strike this matter from the active docket of the Court and to send certified copies of this Order to all counsel of record for the parties.

ENTER: This 2nd day of March, 1999.

/s/ James C Turk
UNITED STATES DISTRICT
JUDGE

11 U.S.C. § 101. Definitions.

* * *

(10) "creditor" means –

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

(B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(i) of this title; or

(C) entity that has a community claim;

* * *

(13) "debtor" means person or municipality concerning which a case under this title has been commenced;

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11 U.S.C. § 505. Determination of tax liability

(a)(1) Except as provided in paragraph (2) of this subsection, the court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

(2) The court may not so determine –

(A) the amount or legality of a tax, fine, penalty, or addition to tax if such amount or legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case under this title; or

(B) any right of the estate to a tax refund, before the earlier of –

(i) 120 days after the trustee properly requests such refund from the governmental unit from which such refund is claimed; or

(ii) a determination by such governmental unit of such request.

(b) A trustee may request a determination of any unpaid liability of the estate for any tax incurred during the administration of the case by submitting a tax return for such tax and a request for such a determination to the governmental unit charged with responsibility for collection or determination of such tax. Unless such return is fraudulent, or contains a material misrepresentation, the trustee, the debtor, and any successor to the debtor are discharged from any liability for such tax –

(1) upon payment of the tax shown on such return, if –

(A) such governmental unit does not notify the trustee, within 60 days after such request, that such return has been selected for examination; or

(B) such governmental unit does not complete such an examination and notify the trustee of any tax due, within 180 days after such request or within such additional time as the court, for cause, permits;

(2) upon payment of the tax determined by the court, after notice and a hearing, after completion by such governmental unit of such examination; or

(3) upon payment of the tax determined by such governmental unit to be due.

(c) Notwithstanding section 362 of this title, after determination by the court of a tax under this section, the governmental unit charged with responsibility for collection of such tax may assess such tax against the estate, the debtor, or a successor to the debtor, as the case may be, subject to any otherwise applicable law.

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11 U.S.C. § 1141. Effect of confirmation

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

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26 U.S.C. § 172. Net operating loss deduction.

(a) Deduction allowed.

There shall be allowed as a deduction for the taxable year an amount equal to the aggregate of (1) the net operating loss carryovers to such year, plus (2) the net operating loss carrybacks to such year. For purposes of this subtitle, the term "net operating loss deduction" means the deduction allowed by this subsection.

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26 U.S.C. § 311. TAXABILITY OF CORPORATION ON DISTRIBUTION (PRIOR TO AMENDMENT BY THE TAX REFORM ACT OF 1986).

(a) General rule.

Except as provided in subsections (b), (c) and (d) of this section and section 453(B), no gain or loss shall be recognized to a corporation on the distribution, with respect to its stock, of –

(1) its stock (or rights to acquire its stock), or

(2) property.

(b) LIFO inventory.

(1) Recognition of gain. If a corporation inventorying goods under the method provided in section 472 (relating to last-in, first-out inventories) distributes inventory assets (as defined in paragraph (2)(A)), then the amount (if any) by which –

(A) the inventory amount (as defined in paragraph (2)(B) of such assets under a method authorized by section 471 (relating to general rule for inventories), exceeds

(B) the inventory amount of such assets under the method provided in section 472.

shall be treated as gain to the corporation recognized from the sale of such inventory assets.

(2) Definitions. For purposes of paragraph (1) –

(A) Inventory assets. The term 'inventory assets' means stock in trade of the corporation, or other property of a kind which would properly be included in the inventory of the corporation if on hand at the close of the taxable year.

(B) Inventory amount. The term 'inventory amount' means, in the case of inventory assets distributed during a taxable year, the amount of such inventory assets determined as if the taxable year closed at the time of such distribution.

(3) Method of determining inventory amount. For purposes of this subsection, the inventory amount of assets under a method authorized by section 471 shall be determined –

(A) If the corporation uses the retail method of valuing inventories under section 472, by using such method, or

(B) If subparagraph (A) does not apply, by using cost or market, whichever is lower.

(c) Liability in excess of basis.

If –

(1) a corporation distributes property to a shareholder with respect to its stock.

(2) such property is subject to a liability, or the shareholder assumes a liability of the corporation in connection with the distribution, and

(3) the amount of such liability exceeds the adjusted basis (in the hands of the distributing corporation) of such property.

then gain shall be recognized to the distributing corporation in an amount equal to such excess as if the property distributed had been sold at the time of the distribution. In the case of a distribution of property subject to a liability which is not assumed by the shareholder, the amount of gain to be recognized under the preceding sentence shall not exceed the excess, if any, of the fair market value of such property over its adjusted basis.

(d) Distributions of appreciated property.

(1) In general. If –

(A) a corporation distributes property (other than an obligation of such corporation) to a shareholder in a distribution to which subpart A applies, and

(B) the fair market value of such property exceeds its adjusted basis (in the hands of the distributing corporation).

then gain shall be recognized to the distributing corporation in an amount equal to such excess as if the property

distributed had been sold at the time of the distribution. This subsection shall be applied after the application of subsections (b) and (c).

(2) Exceptions and limitations.

Paragraph (1) shall not apply to –

(A) a distribution which is made with respect to qualified stock if –

(i) section 302(b)(4) applies to such distribution, or

(ii) such distribution is a qualified dividend;

(B) a distribution of stock or an obligation of a corporation if the requirements of paragraph (2) of subsection (e) are met with respect to the distribution;

(C) a distribution to the extent that section 303(a) (relating to distributions in redemption of stock to pay death taxes) applies to such distribution;

(D) a distribution to a private foundation in redemption of stock which is described in section 537(b)(2)(A) and (B); and

(E) a distribution by a corporation to which part I of subchapter M (relating to regulated investment companies) applies, if such distribution is in redemption of its stock upon the demand of the shareholder.

* * *

(c) Definitions and special rules for subsection (d)(2).

For purposes of subsection (d)(2) and this subsection –

(1) Qualified stock.

(A) In general. The term 'qualified stock' means stock held by a person (other than a corporation) who at all times during the lesser of –

(i) the 5-year period ending on the date of distribution, or

(ii) the period during which the distributing corporation (or a predecessor corporation) was in existence.

held at least 10 percent in value of the outstanding stock of the distributing corporation (or predecessor corporation).

(B) Determination of stock held. Section 318 shall apply in determining ownership of stock under subparagraph (A); except that, in applying section 318(a)(1), the term 'family' includes any individual described in section 267(c)(4) and any spouse of any such individual.

(C) Rules for passthru entities. In the case of an S corporation, partnership, trust, or estate –

(i) the determination of whether subparagraph (A) is satisfied shall be made at the shareholder, partner, or beneficiary level (rather than at the entity level), and

(ii) the distribution shall be treated as made directly to the shareholders, partners, or beneficiaries in proportion to their respective interests in the entity.

(2) Distributions of stock or obligations of controlled corporations.

(A) Requirements. A distribution of stock or an obligation of a corporation (hereinafter in this paragraph referred to as the 'controlled corporation' meets the requirements of this paragraph if –

(i) such distribution is made with respect to qualified stock,

(ii) substantially all of the assets of the controlled corporation consists of the assets of 1 or more qualified businesses,

(iii) no substantial part of the controlled corporation's nonbusiness assets were acquired from the distributing corporation, in a transaction to which section 351 applied or as a contribution to capital, within the 5-year period ending on the date of the distribution, and

(iv) more than 50 percent in value of the outstanding stock of the controlled corporation is distributed by the distributing corporation with respect to qualified stock.

(B) Definitions. For purpose of subparagraph (A) –

(i) Qualified business. The term 'qualified business' means any trade or business which –

(I) was actively conducted throughout the 5-year period ending on the date of the distribution, and

(II) was not acquired by any person within such period in a transaction in which gain or loss was recognized in whole or in part.

(ii) Nonbusiness asset. The term 'nonbusiness asset' means any asset not used in the active conduct of a trade or business.

(3) Qualified dividend. The term 'qualified dividend' means any distribution of property to a shareholder other than a corporation if –

(A) such distribution is a dividend,

(B) such property was used by the distributing corporation in the active conduct of a qualified business (as defined in paragraph (2)), and

(C) such property is not property described in paragraph (1) or (4) of section 1221.

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26 U.S.C. § 641. Imposition of tax.

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(b) Computation and payment

The taxable income of an estate or trust shall be computed in the same manner as in the case of an individual, except as otherwise provided in this part. The tax shall be computed on such taxable income and shall be paid by the fiduciary. For purposes of this subsection, a foreign trust or foreign estate shall be treated as a nonresident alien individual who is not present in the United States at any time.

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26 U.S.C. § 1221. Capital asset defined.

For purposes of this subtitle, the term "capital asset" means property held by the taxpayer (whether or not connected with his trade or business), but does not include –

(1) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business:

* * *

(4) accounts or notes receivable acquired in the ordinary course of trade or business for services rendered or from the sale of property described in paragraph (1):

* * *

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26 U.S.C. § 6012. Persons required to make returns of income.

(a) General rule.

Returns with respect to income taxes under subtitle A shall be made by the following:

* * *

(4) Every trust having for the taxable year any taxable income, or having gross income of $600 or over, regardless of the amount of taxable income;

* * *

(b) Returns made by fiduciaries and receivers.

* * *

(3) Receivers, trustees and assignees for corporations.

In a case where a receiver, trustee in a case under title 11 of the United States Code, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated, such receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns.

(4) Returns of estates and trusts. Returns of an estate, a trust, or an estate of an individual under chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof.

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26 U.S.C. § 6034A. Information to beneficiaries of estates and trusts.

(a) General rule.

The fiduciary of any estate or trust required to file a return under section 6012(a) for any taxable year shall, on or before the date on which such return was required to

be filed, furnish to each beneficiary (or nominee thereof) –

(1) who receives a distribution from such estate or trust with respect to such taxable year, or

(2) to whom any item with respect to such taxable year is allocated,

a statement containing such information required to be shown on such return as the Secretary may prescribe.

(b) Nominee reporting.

Any person who holds an interest in an estate or trust as a nominee for another person –

(1) shall furnish to the estate or trust, in the manner prescribed by the Secretary, the name and address of such other person, and any other information for the taxable year as the Secretary may by form and regulations prescribe, and

(2) shall furnish in the manner prescribed by the Secretary to such other person the information provided by the estate or trust under subsection (a).

(c) Beneficiary's return must be consistent with estate or trust return or Secretary notified of inconsistency.

(1) In general. A beneficiary of any estate or trust to which subsection (a) applies shall, on such beneficiary's return, treat any reported item in a manner which is consistent with the treatment of such item on the applicable entity's return.

(2) Notification of inconsistent treatment.

(A) In general. In the case of any reported item, if –

(i)(I) the applicable entity has filed a return but the beneficiary's treatment on such beneficiary's return is (or may be) inconsistent with the treatment of the item on the applicable entity's return, or

(II) the applicable entity has not filed a return, and

(ii) the beneficiary files with the Secretary a statement identifying the inconsistency,

paragraph (1) shall not apply to such item.

(B) Beneficiary receiving incorrect information. A beneficiary shall be treated as having complied with clause (ii) of subparagraph (A) with respect to a reported item if the beneficiary –

(i) demonstrates to the satisfaction of the Secretary that the treatment of the reported item on the beneficiary's return is consistent with the treatment of the item on the statement furnished under subsection (a) to the beneficiary by the applicable entity, and

(ii) elects to have this paragraph apply with respect to that item.

(3) Effect of failure to notify. In any case –

(A) described in subparagraph (A)(i)(I) of paragraph (2), and

(B) in which the beneficiary does not comply with subparagraph (A)(ii) of paragraph (2),

any adjustment required to make the treatment of the items by such beneficiary consistent with the treatment of the items on the applicable entity's return shall be treated as arising out of mathematical or clerical errors and assessed according to section 6213(b)(1). Paragraph (2) of

section 6213(b) shall not apply to any assessment referred to in the preceding sentence.

(4) Definitions. For purposes of this subsection –

(A) Reported item. The term "reported item" means any item for which information is required to be furnished under subsection (a).

(B) Applicable entity. The term "applicable entity" means the estate or trust of which the taxpayer is the beneficiary.

(5) Addition to tax for failure to comply with section. For addition to tax in the case of a beneficiary's negligence in connection with, or disregard of, the requirements of this section, see part II of subchapter A of chapter 68.

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26 U.S.C. § 6511. Limitations on credit or refund.

* * *

(d) Special rules applicable to income taxes.

* * *

(2) Special period of limitation with respect to net operating loss or capital loss carrybacks.

(A) Period of limitation. If the claim for credit or refund relates to an overpayment attributable to a net operating loss carryback or a capital loss carryback, in lieu of the 3-year period of limitation prescribed in subsection (a), the period shall be that period which ends 3 years after the time prescribed by law for filing the return (including extensions thereof) for the taxable year of the net operating loss or net capital loss which results in such carryback, or

the period prescribed in subsection (c) in respect of such taxable year, whichever expires later. In the case of such a claim, the amount of the credit or refund may exceed the portion of the tax paid within the period provided in subsection (b)(2) or (c), whichever is applicable, to the extent of the amount of the overpayment attributable to such carryback.

(B) Applicable rules.

(i) In general. If the allowance of a credit or refund of an overpayment of tax attributable to a net operating loss carryback or a capital loss carryback is otherwise prevented by the operation of any law or rule of law other than section 7122 (relating to compromises), such credit or refund may be allowed or made, if claim therefor is filed within the period provided in subparagraph (A) of this paragraph.

(ii) Tentative carryback adjustments. If the allowance of an application, credit, or refund of a decrease in tax determined under section 6411(b) is otherwise prevented by the operation of any law or rule of law other than section 7122, such application, credit, or refund may be allowed or made if application for a tentative carryback adjustment is made within the period provided in section 6411(a).

(iii) Determinations by courts to be conclusive. In the case of any such claim for credit or refund or any such application for a tentative carryback adjustment, the determination by any court, including the Tax Court, in any proceeding in which the decision of the court has become final, shall be conclusive except with respect to –

(I) the net operating loss deduction and the effect of such deduction, and

(II) the determination of a short-term capital loss and the effect of such short-term capital loss, to the extent that such deduction or short-term capital loss is affected by a carryback which was not an issue in such proceeding.

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26 U.S.C. § 7421. Prohibition of suits to restrain assessment or collection.

(a) Tax.

Except as provided in sections 6212(a), and (c), 6213(a), 6225(b), 6246(b), 6672(b), 6694(c), and 7426(a) and (b)(1), 7429(b), and 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

(b) Liability of transferee or fiduciary.

No suit shall be maintained in any court for the purpose of restraining the assessment or collection (pursuant to the provisions of chapter 71) of –

(1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any internal revenue tax, or

(2) the amount of the liability of a fiduciary under section 3713(b) of title 31, United States Code in respect of any such tax.

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26 U.S.C. § 7422. Civil actions for refund.

(a) No suit prior to filing claim for refund.

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

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28 U.S.C. § 1340. Internal revenue; customs duties

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Court of International Trade.

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28 U.S.C. § 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

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28 U.S.C. § 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, [26 USCS § 7428] a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding

regarding a class or kind of Canadian merchandise, as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Treas. Reg. § 301.6511(d)-2(a)(3)(b)(1)

(b)(1) Barred Overpayments. If the allowance of a credit or refund of an overpayment of tax attributable to a net operating loss carryback or capital loss carryback is otherwise prevented by the operation of any law or rule of law (other than section 7122, relating to compromises), such credit or refund may be allowed or made under the provisions of section 6511(d)(2)(B) if a claim therefor is filed within the period provided by section 6511 (d)(2)(A) and paragraph (a) of this section for filing a claim for credit or refund of an overpayment attributable to a carryback. Similarly, if the allowance of an application, credit, or refund of a decrease in the tax determined under section 6411(b) is otherwise prevented by the operation of any law or rule of law (other than section 7122), such application, credit, or refund may be allowed or made if an application for a tentative carryback adjustment is filed within the period provided in section 6411(a). Thus, for example, even though the tax liability (not including the net operating loss deduction or capital loss carryback (or the effect of such deduction or carryback)) for a given taxable year has previously been litigated before the Tax Court, credit or refund of an overpayment may be allowed or made despite the provisions of section 6512(a), if claim for such credit or refund is filed within the period provided in section 6511(d)(2)(A) and paragraph (a) of this section. In the case of a claim for credit or refund of an overpayment attributable to a carryback, or in the case of an application for a tentative carryback adjustment, the determination of any court, including the Tax Court, in any

proceeding in which the decision of the court has become final, shall be conclusive except with respect to the net operating loss deduction, and the effect of such deduction, or with respect to the determination of a short-term capital loss, and the effect of such short-term capital loss, to the extent that such deduction or short-term capital loss is affected by a carryback which was not in issue in such proceeding.

* * *

H.R. Rep. No. 849, 1st Sess. 30 (1945), 1945 C.B. 566, 587

* * *

Though it is the purpose of subsection (g) to permit taxpayers to receive credit or refund of an overpayment of tax resulting from a carry-back, even though such credit or refund normally would be barred by the doctrine of res judicata or by some other law or rule of law, it is not intended that any determination of issues, including carry-back issues, made by any court in a proceeding in which the decision has become final shall be open for reconsideration. Subsection (g) provides that in the case of a claim for credit or refund of an overpayment attributable to a carry-back, or in the case of an application for a tentative carry-back adjustment, the determination of any court, including The Tax Court, in any proceeding in which the decision of the court has become final, shall be conclusive except with respect to the net operating loss deduction and the unused excess profits credit adjustment, and the effect of such deduction and adjustment, to the extent that such deduction or adjustment is affected by a carry-back which was not in issue in such proceeding. The operation of subsection (g) may be illustrated by the following example:

* * *

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Chapter 11

FRED STANTON SMITH, as Trustee of the MIAMI CENTER LIQUIDATING TRUST,

Plaintiff,

vs.

THE BANK OF NEW YORK, UNITED STATES OF AMERICA, MIAMI CENTER LIMITED PARTNERSHIP, CHOPIN ASSOCIATES, HOLYWELL CORPORATION, THEODORE B. GOULD, and MIAMI CENTER CORPORATION,

Defendants.
_____/

Adversary No. 87-0627-BKC-SMW-A

Case Nos.
84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

ORDER APPROVING STIPULATION AND JOINT MOTION FOR APPROVAL OF COMPROMISE AND SETTLEMENT OF CLAIMS OF THE UNITED STATES OF AMERICA

THIS MATTER having come before the Court on September 21, 1993 on the stipulation and Joint Motion for Approval of Compromise and Settlement of Claims of the United States of America, filed by Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust ("Trustee"), and the United States of American, appearing specially for the purpose of this motion, and the Court

having reviewed the motion and the file, having heard the testimony, argument of counsel, and having considered the objections of debtors Theodore B. Gould and Holywell Corporation, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

1. Due and proper notice of the Stipulation and Joint Motion was given to all creditors and parties in interest.

2. No objections to the Stipulation and Joint Motion were filed except the jointly filed objections of Holywell Corporation and Theodore B. Gould.

3. Mr. Gould appeared *pro se* at the hearing on the Stipulation and Joint Motion, and indicated he does not object to the amount by which the claims are being compromised. His other objections were stated into the record. No counsel appeared for Holywell Corporation.

4. The United States of America has asserted taxes against the Miami Center Liquidating Trust, the bankruptcy estate of Theodore B. Gould and Holywell Corporation and subsidiaries in a sum in excess of $50 million. The settlement is for $10 million, in addition to the approximately $3.3 million already paid.

5. The terms of the settlement are set forth in detail in the Stipulation and Joint Motion, which is attached hereto and made a part hereof.

6. Robert Panoff, Esquire, the Trustee's tax counsel, testified in support of the settlement. He testified that the amount of taxes sought to be recovered by the United States of American is in excess of $50 million, and that

given the hazards of litigation, the potential liability of the Trust would be far in excess of the amount for which the claims are to be settled. He further testified that the settlement of the taxes as proposed in the Stipulation and Joint Motion is reasonable and in the best interests of the Miami Center Liquidating Trust in light of all of the facts and the hazards of litigation.

7. The Court notes that the United States of America has not made any assessments against the Trustee individually and has waived penalties. The United States of America has further indicated that the Trustee will not have any exposure to the United States, in his individual and personal capacity, for the tax liabilities set forth in the Stipulation and Joint Motion.

8. Counsel for the United States of America has also stated that the settlement, as set forth in the Stipulation and Joint Motion, does not involve the Miami Center Joint Venture.

9. The standards for approving a compromise set forth in *In re Jackson Brewing Co.*, 624 F.2d 599 (5th Cir. 1980), have been established and the terms of the proposed settlement appear to be reasonable and in the best interest of the Miami Center Liquidating Trust.

10. The Court is fully familiar with the history of these proceedings, and has considered the pleadings, the facts, the objections, and argument of counsel. The Court is apprised of all of the necessary facts for an intelligent, objective and educated evaluation of this compromise. The terms of the compromise, when compared with the hazards of litigation, is eminently reasonable. The proposed compromise falls well above the "lowest point in

the range of reasonableness." *See In re Caltronics Services, Inc.*, 762 F.2d 185 (2d Cir. 1985); *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983).

11. The payment to the United States of America of $10 million, in addition to the approximately $3.3 million previously paid, is without prejudice to the rights of the Trustee to assert any claims he may have against any party (except the United States of America), including, but not limited to, The Bank of New York.

12. The Court orders that the proposed settlement contained in the Stipulation and Joint Motion, attached hereto and made a part hereof, be and the same is hereby approved. The Trustee is authorized and directed to take the necessary actions to consummate the settlement in accordance with its terms.

DONE AND ORDERED in Chambers, Miami, Dade County, Florida, this 30 day of September 1993.

SIDNEY M. WEAVER
CHIEF UNITED STATES
BANKRUPTCY JUDGE

Conformed copies to
Herbert Stettin for
distribution to all
counsel of record
and interested parties

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

IN RE:	)	Case No.
HOLYWELL CORPORATION, et al.	)	84-10590-BKC-SMW
	)	Chapter 11
Debtors.	)	
	)	Adv. No.
FRED STANTON SMITH, etc.,	)	87-0627-BKC-SMW-A
Plaintiff,	)	
v.	)	
UNITED STATES OF AMERICA, et al.,	)	
Defendants.	)	

JOINT MOTION FOR APPROVAL OF COMPROMISE OF TAX LIABILITIES ASSERTED BY UNITED STATES OF AMERICA

Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust ("Trustee')[1], and the United States of America ("United States") jointly move the Court for approval of the compromise of tax liability asserted by the United States against the Trustee, Holywell Corp. and subsidiaries, the bankruptcy estate of Theodore B. Gould, and the Miami Center Liquidating Trust and its assets,

[1] Any reference to "Trustee" in this motion shall refer to Fred Stanton Smith solely in his capacity as Trustee of the Miami Center Liquidating Trust and not in his individual or personal capacity.

upon the terms and conditions described hereinafter, pursuant to Fed. R. Bankr. Proc. 2002(a)(3) and 9019(a), and say:

Procedural History

1. On August 22, 1984, Theodore B. Gould, Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation and Chopin Associates (collectively "Debtors") filed simultaneously petitions under Chapter 11 of the Bankruptcy Code.

2. On August 8, 1985, the Court confirmed a plan of reorganization submitted by the Bank of New York ("Bank"). *See Holywell Corp. v. Bank of New York*, 59 B.R. 340 (S.D. Fla. 1986), *dismissed as moot sub nom., Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 109 S. Ct. 69 (1988). The plan provided for the creation of the Miami Center Liquidating Trust ("Trust"), consisting of all of the assets of the Debtors as defined by 11 U.S.C. §541(a). The plan also provided for the appointment of a Trustee to carry out its terms. The Court appointed Fred Stanton Smith as trustee shortly after confirmation.

3. On December 27, 1987, the Trustee commenced this adversary proceeding seeking a determination of whether he was required to file federal income tax returns or pay income taxes. The Trustee further requested a determination of the amount of the tax liabilities should the Court determine that he be required to file the returns and pay the taxes at issue.

4. On February 25, 1992, the United States Supreme Court ruled that the Trustee was required to file federal tax returns and pay federal taxes pursuant to Sections 6012(b)(3) and (4) and 6151 of the Internal Revenue Code. *Holywell Corp. v. Smith*, 112 S. Ct. 1021 (1992). The adversary proceeding is now before the Court on remand.

5. On July 14, 1992, the Internal Revenue Service ("Service") issued a revenue agent's report to "Fred Stanton Smith acting on behalf of Holywell Corporation & subsidiaries" ("Holywell Report") asserting the following tax liabilities:

Period	Tax	Penalty
07/31/85	$ 36,414	0
07/31/86	$ 19,144,938	$ 5,743,481
07/31/87	$ 193,384	$ 58,015
07/31/88	0	0
07/31/89	$ 246,971	$ 12,349
07/31/90	$ 810,513	$ 162,103
07/31/91	0	0
	$ 20,432,220	$ 5,975,948

6. Because Holywell Corporation and its subsidiaries file consolidated returns, each is liable for taxes owed by a member of the affiliated group.

7. On December 16, 1992, the Service issued a report to "The Bankruptcy Estate of Theodore B. Gould" ("Estate Report") asserting an income tax liability in the amount of $1,218,732 for the period ended October 10, 1985, the effective date of the plan of reorganization.

8. On January 5, 1993, the Service issued a report to "Miami Center Liquidating Trust, Fred Stanton Smith-

Trustee" ("Trust Report") asserting the following tax liabilities:

Period	Tax
12/31/85	0
12/31/86	$ 26,083
12/31/87	$ 29,931
12/31/88	$ 26,026
12/31/89	$ 87,452
12/31/90	$ 65,958
12/31/91	$ 2,596,584
	$ 2,832,034

9. On October 11, 1992, the Court entered an Agreed Order granting the parties 150 days in which to attempt to reach an amicable resolution of the amount and payment of the taxes owed to the United States. In February 1993, the Court extended the Agreed Order for an additional 90 days.

10. Shortly after the first Agreed Order, on October 29, 1992, the Trustee filed a protest to the Holywell Report with the Service. On February 4, 1993, the Trustee submitted additional support for the protest. On May 27, 1993, the Trustee filed protests to the Bankruptcy Estate Report and the Trust Report, as well.

11. The Trustee has filed a federal income tax return and paid taxes for Holywell Corporation and subsidiaries for the taxable year ended July 31, 1992, and has made estimated payments for the year ending July 31, 1993. The Trustee has also made estimated payments for the Miami Center Liquidating Trust for the year ended December 31, 1992. These payments total $3,327,229.00.

12. After initial settlement negotiations failed, the Court set the adversary proceeding for trial on June 21, 1993. Following extensive discovery and further negotiations, the Trustee and the United States are pleased to advise the Court that they have reached a compromise as set forth below. The compromise has been accepted on behalf of the Attorney General of the United States pursuant to 26 U.S.C. §7122(a).

Compromise

13. The Trustee and the United States have reached an agreement, subject to the approval of the Court, to compromise and settle –

(A) the income tax liabilities asserted against the Trustee for –

(1) Holywell Corporation and subsidiaries for the taxable years ended July 31, 1985, through July 31, 1993,

(2) the bankruptcy estate of Theodore B. Gould for the taxable years ended December 31, 1984, and October 10, 1985, and

(3) the Miami Center Liquidating Trust for the taxable years ended December 31, 1985, through December 31, 1993, except as set forth in paragraph 13(B) (4) below,

(B) on the basis of –

(1) a payment by the Trustee to the United States of $10,000,000, in addition to the amounts previously paid by the Trustee (approximately $3,327,229);

(2) the United States will retain the amounts previously paid by the Trustee:

(3) there shall be no tax attribute carryovers available to Holywell Corporation and subsidiaries as of July 31, 1993, the bankruptcy estate of Theodore B. Gould as of October 10, 1985, or the Miami Center Liquidating Trust as of December 31, 1993, except for the Trust's distributive share of Miami Center Joint Venture's losses in the taxable year of the Trust ending December 31, 1993, or in a subsequent taxable year or years, to the extent otherwise allowable by law, but such losses shall not be carried back to a taxable year of any taxpayer ending before January 1, 1993, and the Trustee reserves the right to file a tax return on behalf of the Trust for the taxable year ending December 31, 1993, and the right to make any appropriate elections therein under Internal Revenue Code Section 172(b) (3) to relinquish the entire carryback period with respect to a net operating loss, if any, or the taxable year ending December 31, 1993; nor shall any tax attribute carryovers from such taxpayers be available to their successor(s) by reorganization or to otherwise, as of the last day of the taxable year applicable to each respective taxpayer; and no further adjustments to tax liabilities of any such taxpayers for any taxable year ending before January 1, 1994, shall be made by reason of carrybacks of any tax attributes to such years or for any other reason, except as set forth in paragraph 13(B) (4);

(4) the tax liability of the Miami Center Liquidating Trust for the year ended December 31, 1993, shall be open for adjustment by the United States; in the event the United States

asserts an additional tax liability for the year needed December 31, 1993, the Trustee will be entitled to receive credit for an estimated payment in the amount of $37,229.00 against such additional tax liability;

(5) the Trustee waives restrictions on assessment so that the United States is permitted, though not required, to make immediate assessments of the tax liabilities compromised herein or take whatever administrative action is appropriate to account for the payment to be made pursuant to the compromise; and

(6) except as set forth in paragraph 13(B)(4), no further sums shall be required with respect to the tax liabilities set forth in paragraph 13(A)(1)-(3) upon the payment of the $10 million as set forth in paragraph 14.

14. The $10 million shall be paid by the Trustee to the United States on the eleventh day after the entry of the Court's order approving the compromise, unless a stay has been entered by a court of competent jurisdiction. In the event the $10 million is not paid to the United States, for any reason, on the eleventh day after the entry of the order approving the compromise, interest shall be payable to the United States at the rates established pursuant to 26 U.S.C. §§6621(a)(2) and (c) and 6622(a), computed form [sic] the date of such eleventh dy [sic] until paid.

15. The payment by the Trustee pursuant to the compromise shall be made by means of an electronic funds transfer to the account of the United States Department of Justice at Citizens & Southern National Bank [C&S ATL], in Atlanta, Georgia, Bank Code 061000052,

Account Number 00924449, Deposit Identifier No. TAX-3-EFT Collection Office No. 8853096.

16. The payment by the Trustee pursuant to the compromise is without prejudice to the rights of the Trustee to assert any claims he may have against any person or entity (except the United States, its agencies or officers) including, but not limited to, the Bank.

17. This settlement specifically excludes claims 205 and 206 filed by the Internal Revenue Service in the consolidated bankruptcy proceeding of Holywell Corporation, et al.

18. The parties further agree that they will cooperate to the extent reasonably necessary to obtain Court approval of this proposed compromise and, if necessary, to obtain an affirmance of the order approving the compromise in the appellate courts.

Reasons for Approval

19. The Trustee and the United States have reached their compromise after extensive negotiations and careful consideration of their respective positions. Approval of this compromise will avert years of litigation in several different courts with respect to the amount of the tax liabilities at issue.

20. The Trustee is satisfied that there are sufficient litigation hazards such as to warrant a settlement. The Trustee also believes that litigation and the resulting expense and inconvenience to the Trust, as well as the attendant delay in the closing of these protracted and

litigious cases would not be in the best interests of the Trust or other interested parties.

21. The standards for approving a compromise are well established. *See In re Jackson Brewing Co.*, 624 F.2d 599 (5th Cir. 1980). *See also In re Teltronics Services, Inc.*, 762 F.2d 185 (2d Cir. 1985); *In re Prudence Co.*, 98 F.2d 599 (2d Cir. 1938), *cert. denied*, 306 U.S. 636 (1939). The Court must consider all of the relevant facts and evaluate whether the proposed compromise falls below the "lowest point in the range of reasonableness." *Teltronics*, 762 F.2d at 189; *In re W.T. Grant Co.*, 699 F.2d 599, 608 (1983). The former Fifth Circuit held in *Jackson Brewing*, 624 F.2d at 602, that:

> To assure a proper compromise the bankruptcy judge must be apprised of all the necessary facts for an intelligent, objective, and educated evaluation. He must compare the terms of the compromise with the likely rewards of litigation. *Protective Committee for Stockholders of T.M.T. Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 88 S.Ct. 1157, 1163, 20 L.Ed.2d 1, 10 (1968).

22. Approval of a compromise "does not depend upon establishing as a matter of legal certainty that the subject claim or counterclaim is or is not worthless or valuable." *Florida Trailer & Equipment Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960).

In that case, the former Fifth Circuit further opined:

> But the very uncertainties of litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of a power to compromise. This is a recognition of the policy of the law general to encourage settlement. This could hardly be achieved if the

test on hearing for approval meant establishing success or failure to a certainty.

Id.

23. The compromise represents a substantial reduction of the amount of taxes claimed to be owed by the United States. The Trustee's tax accountants and special tax counsel agree that the compromise is in the best interest of the Trust.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

IN RE:	
HOLYWELL CORPORATION et al.,	Case No. 84-01590-BKC-SMW
Debtors.	Chapter 11
FRED STANTON SMITH etc.,	
Plaintiff,	
v.	Adv. No. 87-0627-BKC-SMW-A
UNITED STATES OF AMERICA, et al.,	
Defendants.	

MOTION BY UNITED STATES OF AMERICA
TO DISMISS OR FOR ABSTENTION

The United States of America, by and through its undersigned attorney, respectfully moves the Court to dismiss this adversary proceeding on the ground that the Court lacks jurisdiction to determine the amount of the federal income tax liabilities of the plaintiff. In the alternative, the United States moves the Court to abstain from determining the amount of the federal income tax liabilities of the plaintiff. The following Memorandum is respectfully submitted in support of this motion.

MEMORANDUM

STATEMENT OF THE CASE

Miami Center Limited Partnership ("MCLP") obtained a loan from the Bank of New York ("Bank") for the development of the Miami Center, a commercial real estate project in downtown Miami. Following default on this loan, MCLP and the related Holywell Corp. ("Holywell"), Chopin Assoc., Miami Center Corp. and Theodore B. Gould ("Mr. Gould") (collectively, "debtors") filed in August 1984 voluntary petitions for reorganization under chapter 11 of the Bankruptcy Code. The debtors and the Bank submitted competing plans of reorganization. On August 8, 1985, the Court confirmed an amended version of the Bank's plan.

The United States District Court for the Southern District of Florida affirmed the confirmation order. *Holywell Corp. v. Bank of New York*, 59 B.R. 340 (S.D. Fla. 1986). The Eleventh Circuit dismissed the debtors' appeal of the confirmation order as moot as a result of the substantial consummation of the plan. *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir. 1988).

The confirmed plan provided for the establishment of a trust on behalf of the debtors and for the appointment of an individual designated as Trustee of all property of the bankruptcy estates of the debtors. The Court appointed on August 12, 1985, Fred Stanton Smith as Trustee ("Trustee" or "plaintiff") pursuant to the terms of the confirmed plan.

Pursuant to the plan, all right, title and interest of the debtors in and to the trust property vested in the Trustee on the effective date of the plan, October 10, 1985. On October 10, 1985, the Trustee sold the Miami Center for $255.6 million.

Neither the debtors nor the Trustee filed federal income tax returns for any year ending after July 31, 1985. As a result, no one reported the gains realized from the sale of the Miami Center or the interest income derived from reinvestment of the sales proceeds. Instead, on December 27, 1987, the plaintiff commenced an adversary proceeding seeking a determination with respect to whether he was required to file federal income tax returns or pay income taxes.

On April 28, 1988, the Court held that the plaintiff was not required to file federal income tax returns. *Smith v. United States (In re Holywell Corp.)*, 85 B.R. 898 (Bankr. S.D. Fla. 1988). The district court affirmed. *Smith v. United States*, No. 88-0795-CIV-KEHOE (S.D. Fla. July 31, 1989). The Eleventh Circuit, with one judge dissenting, affirmed the decision of the district court. *Smith v. United States (In re Holywell Corp.)*, 911 F.2d 1539 (11th Cir. 1990).

On February 25, 1992, the Supreme Court, however, reversed the decision of the Eleventh Circuit. *Holywell Corp. v. Smith*, 112 S.Ct. 1021 (1992). The Supreme Court held:

> We conclude in this case that the trustee must pay the tax due on the income attributable to the corporate debtors' property because § 6012(b)(3) requires him to make a return as the "assignee" of the "property . . . of a corporation." We further hold that the trustee must pay the tax

> due on the income attributable to the individual debtor's property because § 6012(b)(4) requires him to make a return as the "fiduciary" of a "trust."

112 S.Ct. at 1024.

Despite the ruling of the Supreme Court, the plaintiff has failed to file any tax returns with the Internal Revenue Service. Instead, the plaintiff has requested that this Court determine the amount of his federal income tax liabilities. The United States respectfully submits that the Court lacks jurisdiction to make such a determination or, in the alternative, should abstain from making such a determination.

ARGUMENT

A. THE COURT SHOULD DISMISS THIS ADVERSARY PROCEEDING

1. Sovereign Immunity

It is axiomatic that the United States, as the sovereign, is immune from suit except where Congress by specific statute has waived its immunity. *United States v. Sherwood*, 312 U.S. 584 (1941). No suit may be maintained against the sovereign unless the suit is brought in exact compliance with the terms of the statute under which the sovereign has consented to be sued. *Soriano v. United States*, 352 U.S. 270, 276 (1957). A waiver of sovereign immunity may not be implied but must be unequivocally expressed. *United States v. Nordic Village, Inc.*, 112 S.Ct. 1011, 1014 (1992); *United States v. King*, 395 U.S. 1, 4 (1969).

2. The Declaratory Judgment Act

Prior to 1978, courts were without jurisdiction to determine the tax liabilities of a bankruptcy estate or a trustee prior to the filing of any returns because such determination violated the Declaratory Judgment Act, 28 U.S.C. § 2201. See *In re Statmaster Corp.*, 465 F.2d 978 (5th Cir. 1972). In 1978 Congress amended the Declaratory Judgment Act upon the enactment of the Bankruptcy Reform Act to provide as follows:

> (a) In a case of actual controversy within its jurisdiction, *except with respect to Federal taxes* other than * * * [*a proceeding under section 505 or 1146 of title 11*] * * * , any court of the United States * * * may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

(Emphasis added. Amendment is bracketed).

Any action seeking a declaratory judgment with respect to federal taxes (such as this adversary proceeding in which the plaintiff is seeking a determination of the amount of a tax liability) brought in bankruptcy court is thus barred by the Declaratory Judgment Act unless it comes with the scope of Sections 505 or 1146[1] of the Bankruptcy Code. See *In re Hartman Material Handling Systems, Inc., (Allis-Chalmers Corp. v. Goldberg)*, 141 B.R. 802, 812 (Bankr. S.D.N.Y. 1992).

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[1] Section 1146 deals with State or local taxes and thus has no bearing on this adversary proceeding.

Section 505(a)(1) provides that a bankruptcy court "*may* determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction."

Despite the broad language of Section 505, its scope is limited. The Eleventh Circuit has ruled that "[t]he jurisdiction of the bankruptcy courts encompasses determinations of the tax liabilities of debtors who file petitions for relief under the bankruptcy laws. It does not, however, extend to the separate liabilities of taxpayers who are not debtors under the Bankruptcy Code." *United States v. Huckabee Auto Co.*, 783 F.2d 1546, 1549 (11th Cir. 1986). See also *In re Brandt-Airflex Corp. (Brandt-Airflex Corp. v. Long Island Trust Co., N.A.)*, 843 F.2d 90, 94-96 (2nd Cir. 1988).

Since the plaintiff is not seeking a determination of the tax liability of a debtor or a bankruptcy estate, Section 505 does not grant jurisdiction to the Court to determine the amount of the federal income tax liabilities of the plaintiff.

3. The Anti-Injunction Act

Moreover, the Anti-Injunction Act, 26 U.S.C. § 7426, bars the relief requested by the plaintiff. Section 7421(a) provides, with certain exceptions not applicable here, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by

any person, whether or not such person is the person against whom such tax was assessed."

After the Supreme Court decided that the plaintiff was required to file federal income tax returns, the Internal Revenue Service conducted an examination and issued three reports proposing tax liabilities in excess of $30 million. The Court's intervention in the determination of tax liabilities of the plaintiff is barred by the Anti-Injunction Act. See *In re Heritage Village Church and Missionary Fellowship, Inc., (Clark v. United States)*, 851 F.2d 104 (4th Cir. 1988) (there is no general bankruptcy exception to the Anti-Injunction Act).

There is a judicially created exception to the Anti-Injunction Act whereby an injunction could be issued when (1) it is clear that under no circumstances could the United States prevail and (2) equity jurisdiction otherwise exists. *Enochs v. Williams Packing Navigation Co.*, 370 U.S. 1, 7 (1962). Failure to meet either prong of this test is conclusive. *Bowen v. United States*, 331 F.2d 149 (5th Cir. 1964).

The plaintiff cannot meet the first prong because the resolution of the amount of the tax liabilities would require the Court to resolve factual issues and weigh the evidence. See *Intercontinental Jet, Inc., v. United States*, 690 F. Supp. 1012, 1013 (S.D. Fla. 1988). He cannot meet the second prong because he has an adequate legal remedy in the Tax Court. *Mathes v. United States*, 901 F.2d 1031, 1033 (11th Cir. 1990).

B. THE COURT SHOULD ABSTAIN FROM DETERMINING THE AMOUNT OF THE TAX LIABILITIES

The United States respectfully submits that the Court does not have jurisdiction to determine the amount of the plaintiff's tax liabilities. In any event, Section 505(a) is discretionary; it does not require that the Court make a determination of a tax liability. The Court should abstain from making the determination requested by the plaintiff and require that he file the required federal income tax returns[2] and seek from the Tax Court a determination of the amount of the tax liabilities.

The plaintiff might attempt to argue that the Court can make a more expeditious determination of the tax liabilities at issue. Any decision of this Court is appealable first to the district court[3] and then to the Eleventh

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[2] In *In re Goldblatt Bros., Inc., (Unsecured Creditors' Committee v. United States)*, 106 B.R. 522, 533-534 (Bankr. N.D. Ill. 1989), the bankruptcy court required that the Unsecured Creditors' Committee of the debtor file federal tax returns prior to the exercise of jurisdiction.

[3] An analysis of various cases to which the United States has been a party in this district show that the time between the decision of bankruptcy court and the decision of the district court on an appeal is considerable. For example, in this adversary proceeding it took the district court 15 months to decide the earlier appeal on whether the plaintiff was required to file the tax returns at issue. Other appeals show a similar time frame.

In the following cases the bankruptcy court ruled in favor of the United States and debtors appealed:

[Table Omitted]

In the following cases the bankruptcy court ruled against the United States, an appeal was taken to the district court, and

Circuit. The decision of the Tax Court, however, would be directly appealable to the Eleventh Circuit. The time that could be saved by this direct appeal would be considerable. An intermediate appeal to the district court would make nugatory any expedited decision by this Court. Plaintiff's assertion, if actually made, would thus be illusory.

The Tax Court is the more appropriate court for a resolution of the complex *tax* issues presented in the determination of the amount of the tax liabilities of the plaintiff. As stated by the bankruptcy court in *In re Huddleston*, 107 B.R. 102, 103 (Bankr. E.D. La.):

> The Tax Court has personnel who are already well-versed in the intricacies of tax law, whereas this Court, while it does consider tax issues, would probably have to do initial research not necessary for the Tax Court to do. As the Court stated in *In re Krupke*, [57 B.R. 523, 526 (Bankr. W.D. Wisc. 1987)], "[o]ccasions arise when determination of an issue is best left to a court that decides similar issues regularly, ... " (Citation omitted). Such is the case here. It is judicially economic for the tax liability questions involved in the instant case to be decided by the court whose job it is to do so.

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no further review was (or has been) sought from the Eleventh Circuit:

[Table Omitted]

In the following cases the bankruptcy court ruled against the United States, an appeal was taken to the district court, and review was sought in the Eleventh Circuit:

[Table Omitted]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should dismiss this adversary proceeding or, in the alternative, abstain from the determining the amount of the plaintiff's federal income tax liabilities.

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IRS General Litigation Bulletin No. 391, 1993 G.L.B. Lexis 8 (April 1993)

DIGEST OF LETTERS AND LEGAL OPINIONS

BANKRUPTCY CODE CASES:
Determination
of tax liability: 09.19.07-00
Tax effect of plan
BANKRUPTCY CODE CASES:
Jurisdiction of bankruptcy court: 09.24.04-00
Right of estate to refund
[TEXT REDACTED] (CC:GL-0244-93)

1. Whether the bankruptcy court has jurisdiction over the tax consequences of debtors plan of reorganization, which would be included in the debtors' post-confirmation income tax liability?

2. Whether the bankruptcy court has jurisdiction to determine a debtor subsidiary's right to a "quickie refund" based on a carryback of the consolidated group's NOLs for a post-petition closed year where the bulk of the NOLs are the debtor's?

3. Whether a bankruptcy court's jurisdiction over feasibility of a proposed plan of reorganization gives it jurisdiction to determine tax consequences that could affect feasibility?

1. Any action seeking a declaratory judgment with respect to federal taxes brought in bankruptcy court is barred by the Declaratory Judgment Act, 28 U.S.C. § 2201, unless it comes within the scope of Bankruptcy Code §§ 05 or 1146. See H. Rep. No. 95-599,5th Cong., 1st Sess. 450 (1977); In re Hartman Material Handling Systems, Inc.; Allis-Chalmers Corporation v. Goldberg, 141 B.R. 802 (Bankr. S.D. N.Y. 1992) ("Allis-Chalmers"); 1 Collier on Bankruptcy P3.01[10] at 3-125 (15th Ed. 1992). Section 1146 (d) is the sole source of a

bankruptcy court's jurisdiction to determine the tax consequences of a reorganization proposed as part of a Chapter 11 plan, whether the tax consequences are federal, state or local.

The legislative history show as that Congress twice rejected attempts to amend section 1146 (d) to permit a bankruptcy court to determine the Federal Tax Consequences of a proposed reorganization. Section 303 of H.R. 9973, 95th Cong., 2d Sess. (1978), a version of what ultimately was enacted as the Bankruptcy Tax Act of 1980, proposed to amend section 1146(d) to permit a bankruptcy court to determine the federal tax consequences of a proposed reorganization. The Bankruptcy Tax Act as enacted, however, contained no such provision. Similarly, section 523(a) of the Thurmond-Heflin Amendment (No. 3083) to H.R. 5174, 98th Cong., 2d Sess. (1984), enacted as the Bankruptcy Amendments and Federal Judgeship Act of 1984, proposed to make both sections 1146(c) and (d) applicable to federal taxes by striking out the phase "State or local" in each subsection. See 130 Cong. Rec. S. 6081, 6107-6131 (daily ed. May 21, 1984). Both the version of H.R. 5174 which passed the Senate and the version agreed to in conference, however, amended only section 1146(c). See 130 Cong. Rec. S 8110 (daily ed. June 21, 1984), H 7471 (daily ed. June 29, 1984).

The legislative history of section 505 reveals that the scope of that section extends only to tax consequences of events which have already occurred. The House and Senate reports state that subsections (a) and (b) of section 505 were intended to "permit determination by the bankruptcy court of any unpaid tax liability of the debtor that has not been contested before or adjudicated by a judicial or administrative tribunal. . . . " (emphasis supplied) H. Rep. No. 95-595, at 356, S. Rep. No. 95-989, supra, at 67. No mention is made of the court's authority to determine the tax effects of a proposed reorganization. The use of the phrase "unpaid tax liability" indicates that

Congress was concerned only with taxes relating to events which occurred prior to the time of the hearing under section 505.

The Service's position is supported by the Allis-Chalmers decision where the court, relying on **Holywell**, *found that "no pre-confirmation finding can finally determine tax issues which do not arise until after confirmation." 141 B.R. at 813. Cf. In re McLean Industries, Inc., 132 B.R. 267 (Bankr. S.D.N.Y. 1991) (the bankruptcy court declines to broadly interpret its jurisdiction in the absence of final regulations issued by the Service).*

2. To the extent the debtors seek a bare declaratory judgment, the Declaratory Judgment Act precludes the bankruptcy court from making the requested tax related findings. Since the events of the [TEXT REDACTED] taxable year have already occurred, however, a basis of jurisdiction over this [TEXT REDACTED] year may be found in section 505 of the Bankruptcy Code. Section 505 makes it clear that the debtors must first exhaust statutorily mandated administrative remedies before the Service before the bankruptcy court may exercise jurisdiction over the [TEXT REDACTED] tax liability.

Under section 505(a)(2)(B), a bankruptcy court may not determine any right of the estate to a tax refund before the earlier of 120 days after the trustee properly requests such refund from the governmental unit from which such refund is claimed, or a determination by such governmental unit of such request. Until the debtors actually request the refund and one of the conditions of section 505(a)(2)(B) is met, the bankruptcy court will have no jurisdiction over the [TEXT REDACTED] tax year. Moreover, in the even the Service in fact issues the requested refund, the bankruptcy court will not have jurisdiction over the [TEXT REDACTED] tax year because there will be no dispute for the court to resolve.

Section 505(b) allows trustees (or debtors-in-possession) to request a prompt and binding determination of any tax liability of the bankruptcy estate. The debtors' [TEXT REDACTED]ax liability is a tax liability of the estate. Although the plain language of section 505(b) contemplates a situation where the debtor owes a taxing authority money, the legislative history of section 505(b) does not limit the prompt audit provision to only a payment due situation. Rather a trustee (or debtor-in-possession) may request a tax audit of all tax returns filed by the trustee. Arguably, the debtors in this case could seek a binding determination of their [TAX REDACTED] tax liability under the terms of section 505(b). Section 505(b) provides the sole means of seeking such a binding determination, and debtors are not free to side-step the administrative remedies (and time constraints) fashioned by Congress.

3. The bankruptcy court's jurisdiction over feasibility is limited solely to determining whether or not feasibility exists. If a plan is feasible the court may confirm the plan. If the plan is not feasible, it may not confirm the plan. It is up to the debtors to take whatever action is necessary to present a feasible plan. If the Service asserts that the debtors' characterization of the tax consequences of their plan is incorrect, and adverse tax consequences would render the plan unfeasible, the bankruptcy court is required to refuse to confirm the Plan. There is nothing in the Bankruptcy Code that gives a bankruptcy court the authority to issue binding determinations on matters over which it has no jurisdiction in order to render the plan feasible. Letter to District Counsel [TEXT REDACTED] from Chief, Branch 2 (General Litigation) dated March 23, 1993. [Nancy O. Ryan, 202-622-3630].

IRS General Litigation Bulletin No. 396, 1993 G.L.B. Lexis 4 (Sept. 1993)

DIGEST OF LETTERS AND LEGAL OPINIONS . . .

BANKRUPTCY CODE CASES:
Chapter 11 (Reorganization): 09.11.07A-00
Liquidating Trusts
BANKRUPTCY CODE CASES:
Determination of
tax liability (§ 505):
Jurisdiction of
bankruptcy court 09.19.03-00
BANKRUPTCY CODE CASES:
Jurisdiction
of bankruptcy court:
After confirmation of plan 09.24.01-00
Bankruptcy Court's
Jurisdiction Over Tax
Status of [TEXT REDACTED]
[TEXT REDACTED] (CC:EL:GL:Br2-0612-93)

Whether a bankruptcy court has the jurisdiction to rule on the tax status of, and fair market value of assets transferred to, a "litigation trust" set up pursuant to a plan of reorganization and operating for more than three years, without filing tax returns.

Any action seeking a declaratory judgment with respect to federal taxes brought in bankruptcy court is barred by the Declaratory Judgment Act unless it comes within the scope of Bankruptcy Code §§ 50 or 1146. 28 U.S.C. § 2201; See Allis-Chalmers Corporation v. Goldberg, (In re Hartman Material Handling Systems, Inc.) 141 B.R. 802 (Bankr. S.D. N.Y. 1992) ("Allis-Chalmers"). Bankruptcy Code § 1146(d) creates a specific procedure to be followed whenever a party in interest desires a court to determine the state or local tax consequences

of a proposed reorganization. Since this action involves a determination of federal taxes of an entity created pursuant to a confirmed plan of reorganization, section 1146(d) clearly has no application.

The relief sought by the trustee in this case is similar to that sought by the trustee of a post-confirmation trust in ***Holywell*** *Corp. v. Smith, 112 S. Ct. 1021 (1992) ("****Holywell****"). Both initiated adversary proceedings requesting a determination of their tax liabilities as trustees of post-confirmation entities. In* ***Holywell****, it was the Government's position that the trustee was a "trustee in a case under title 11" within the meaning of I.R.C. § 6012(b), and he was therefore obligated to file tax returns under section 6012(b) and pay tax under I.R.C. § 6151. Since a bankruptcy court does have jurisdiction over a bankruptcy trustee's tax liability, the Government did not initially contest the bankruptcy court's jurisdiction. The Supreme Court did not adopt the Government's view that the* ***Holywell*** *trustee is a "trustee in a case under title 11" within the meaning of section 6012(b)(3) (dealing with obligations to file tax returns on behalf of corporation debtors) and explicitly rejected the view that the was a "trustee in a case under title 11" under section 6012(b)(4) (dealing with individual debtors).*

In accordance with the Supreme Court's decision, it is now our position that the court does not have jurisdiction over the post-confirmation tax consequences of the liquidation trust. In Allis-Chalmers, supra., the court concluded that it would be improper for a bankruptcy court to determine in advance the post-confirmation NOL tax rights of a debtor who has not yet attempted to use its NOLs, and that section 505 does [not] give

a bankruptcy court the authority to rule on the post-confirmation tax effects of an ownership change that took place pursuant to a former debtor's plan of reorganization. 141 B.R. at 813. Moreover, the last section of the Supreme Court's decision in **Holywell** *strongly suggests that the bankruptcy court's jurisdiction over tax matters does not go beyond confirmation of the plan; rather, post-confirmation tax consequences are beyond its reach. See In re Westhold Mfg., Inc., 20 B.R. 368, 371 (Bankr. D. Kan. 1982), aff'd. sub. nom United States v. Redmond, 36 B.R. 932 (D. Kan. 1984). Contra. In re Goldblatt Bros, Inc., 106 B.R. 522 (bankr. N.D. Ill. 1989).*

Even in the unlikely event section 505 does give the bankruptcy court jurisdiction to determing [sic] *the tax liability of the trustee in this case, it does not give the court jurisdiction to grant the relief sought. The trustee has not asked for a determination of his tax liability; he has merely asked that the court make a determination of the tax status of the liquidation trust and the fair market value of assets transferred to the trust. In a recent case out of the Central District of California, a district court ruled that section 505 only gives a bankruptcy court jurisdiction over tax liabilities, not over issues antecedent to the tax liability. Internal Revenue Service, v. Sulmeyer (In re Grand Chevrolet, Inc.), 153 B.R. 296, 24 BCD 281 (C.D. Cal. 1993). The district court held first that the tax issue before the bankruptcy court was not ripe for judicial determination because there was no "actual controversy" to be decided; and second that section 505 only gives the bankruptcy court jurisdiction to determine tax liabilities, but does not give the bankruptcy court jurisdiction to determine issues that are only antecedent to the tax liability, such as the entity's tax status. The district court suggested that the trustee could have*

requested an "administratve opinion" from the Service before seeking assistance from the bankruptcy court.

The Anti-Injunction Act also precludes the bankruptcy court from exercising jurisdiction over the merits of the trust's tax liability. 26 U.S.C. § 7421(a). The bankruptcy court does not have the discretion to interfere with the normal course of tax administration outside the explicit guidelines set forth in section 505(b). See In re Wills; Feldman v. Maryland National Bank, 46 B.R. 333 (Bankr. D. Md. 1985).

The limited exception to the Anti-Injunction Act which is sometimes applied in bankruptcy cases, is not applicable here because a remedy at law is available to the taxpayers and the liquidating trust by filing a return and utilizing the Service's normal administrative procedures if the Service does not accept the return as filed. See In re John Renton Young Ltd., 87 B.R. 635 (Bankr. D. Nev. 1988); In re American Bicycle Assn., 895 F.2d 1277 (9th Cir. 1990). Memorandum from Chief, Branch 2 (General Litigation) to District Counsel, [TEST REDACTED] dated August 18, 1992.

[Nancy O. Ryan, 202-622-3630].